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No. 230

IN THE

Supreme Court of the United States

October Term, [redacted] 1925

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY,
Petitioners,

vs.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Respondent.

No.

PETITION FOR WRIT OF CERTIORARI

THE PENNSYLVANIA RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,
By

HENRY WOLFE BIKLE,
Broad St. Station,
Philadelphia, Pa.

PARKER McCOLLESTER,
466 Lexington Ave.,
New York, N. Y.
Their Attorneys.

IN THE

Supreme Court of the United States

October Term, 1924

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY, *Petitioners,* vs. THE NEW YORK AND PENNSYLVANIA COMPANY, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The New York Central Railroad Company and The Pennsylvania Railroad Company in support of their petition for a writ of certiorari to be directed to the Supreme Court of the State of Pennsylvania, Eastern District, to review a decree of judgment rendered on the 29th day of September, 1924, which affirmed the judgment of the Court of Common Pleas of Clinton County, Pennsylvania, entered on the 23rd day of July, 1923, respectfully show:

1. That this is an action brought by respondent

under Article 5, Section 5, of the Public Service Company Law of Pennsylvania to recover a refund of a portion of the freight charges paid to your petitioners by the respondent on shipments of coal transported by your petitioners over their lines within the State of Pennsylvania from mines in the Munson and Hawk Run Districts of Pennsylvania consigned to the respondent at Lock Haven, Pennsylvania. The action is based upon an order of the Public Service Commission of Pennsylvania directing your petitioners to pay to the respondent reparation in the sum of Six Thousand One Hundred Seventy-two Dollars and Ninety-seven Cents ($6,172.97), being the difference between the freight charges collected by your petitioners on such shipments consigned to the respondent and transported by petitioners during the period from March 1, 1920, to September 1, 1920, and the charges which would have been collected on the basis of the freight rates which the Public Service Commission of Pennsylvania found would have been reasonable, plus interest. Your petitioners having declined to pay the reparation as ordered by the Public Service Commission of Pennsylvania this suit was brought by the respondent under the provisions of the Public Service Company Law above referred to, to recover the amount of reparation so ordered by the Commission.

2. The action was commenced in the Court of Common Pleas of Clinton County, Pennsylvania, the respondent's statement of claim being filed on October 22nd, 1922, alleging, among other things, that your petitioners were common carriers of coal consigned to the respondent and transported over petitioners' lines within the State of Pennsylvania; that there had been shipped to the respondent during the period from March 1st, 1920, to September 1st, 1920, large quantities of coal which were transported by your petitioners; that upon such shipments transported be-

tween March 1, 1920 and August 25, 1920, both inclusive, the respondent had paid a rate of $1.10 per ton and on the shipments moving between August 26th, 1920, and September 1st, 1920, both inclusive, respondent had paid a rate of $1.54 per ton; that upon complaint by the respondent the Public Service Commission of Pennsylvania in so-called Complaint Docket No. 3206 had entered upon a hearing and on August 16, 1921 had made a report wherein it had found that the rates charged had been unreasonable to the extent that they had exceeded $1.00 per ton on shipments moving between March 1, 1920, and August 25, 1920, and $1.40 per ton on shipments moving between August 26, 1920, and September 1, 1920; that thereafter the respondent had filed its petition for reparation for the excess payments this proceeding being known as Reparation Docket No. 4738; that hearings on this petition were held following which the Public Service Commission of Pennsylvania had made its order dated June 20, 1922, directing your petitioners to pay to the respondent the sum of Six Thousand One Hundred Seventy-two Dollars and Ninety-seven Cents ($6,172.97), with interest, and that your petitioners had failed and refused to pay said order or any part thereof. Copies of the reports of the Public Service Commission in so-called Complaint Docket No. 3206 and Reparation Docket No. 4738 were attached to and made a part of the statement of claim.

3. Your petitioners duly filed their answers to said statement of claim. The answers of both your petitioners were substantially the same and were in part as follows:

> "For a separate and complete defense to the Plaintiff's Statement of Claim, this defendant avers that the New York Central Railroad Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts

to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as *New York & Pennsylvania Company* v. *Director General,* 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit 'A'. This defendant 'alleges that by Section 208(a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including section 208(a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of the said rate was not in violation of the Pennsylvania Public Service Company Law.

"This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as Exhibit 'G' would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms

of Section 208(a) of the Transportation Act, 1920, and was therefore null and void.

"This defendant alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff had no cause of action under Section 5 of Article 5 of the Public Service Company Law."

4. The respondent, the plaintiff below, obtained a rule upon your petitioners to show cause why judgment should not be entered for the plaintiff for want of sufficient affidavits of defense.

The Court of Common Pleas of Clinton County made absolute the rule to show cause and directed that judgment be entered for the plaintiff accordingly.

5. Your petitioners duly excepted to the ruling of the Court of Common Pleas of Clinton County and appealed from the judgment of said court to the Supreme Court of Pennsylvania, Eastern District. Argument was had before the Supreme Court of Pennsylvania, Eastern District, in which your petitioners through their counsel argued that since the Interstate Commerce Commission had not approved a reduction in their rates below those in effect on February 29, 1920, these rates, by virtue of Section 208 (a) of the Transportation Act, 1920, were the lawful rates to be charged on shipments moving from March 1, 1920, to September 1, 1920, any order or decision of the Public Service Commission of Pennsylvania to the contrary notwithstanding, and that the giving of judgment for the respondent pursuant to the reparation order of the Public Service Commission of Pennsylvania would be in violation of the provisions of Section 208(a) of the Transportation Act, 1920, and would deny to your petitioners their rights thereunder.

6. The Supreme Court of Pennsylvania, Eastern Dis-

trict, notwithstanding the argument of your petitioners, on or about April 21, 1924 entered an order affirming the judgment of the court below in favor of the respondent. Thereupon your petitioners, believing that this decision of the Supreme Court of Pennsylvania, Eastern District, was based upon an erroneous understanding of the facts, petitioned said court for a re-argument. The court withdrew its original opinion, but later, on July 8, 1924, filed another opinion affirming the judgment of the court below. Believing that the court still erred in its understanding of the facts and in its conclusions of the law, your petitioners filed a further petition for re-argument. This petition was considered by the court and on September 29, 1924, the court entered an order correcting an error in its opinion but denying the petition for re-argument and affirming the judgment of the court below.

7. Your petitioners believe and aver that the effect of the decisions and orders of the Supreme Court of Pennsylvania and of the Court of Common Pleas of Clinton County, Pennsylvania, is to deny to your petitioners a right, privilege or immunity claimed by them under Section 208 (a) of the Transportation Act, 1920, and that said decisions are therefore in error.

8. More particularly your petitioners believe and aver that since (a) the freight charges which were collected on the respondent's shipments transported by your petitioners between March 1, 1920 and September 1, 1920, were computed on the basis of the freight rates in effect on February 29, 1920; since (b) Section 208 (a) of the Transportation Act, 1920, provided that the freight rates in effect on February 29, 1920 should remain in effect until thereafter changed by State or Federal authority and pursuant to authority of law, and that prior to September 1, 1920, no such rates should be reduced without the approval of the Interstate Commerce Commission, and

since (c) no reduction in the freight rates applied to respondent's shipments moving between March 1, 1920 and September 1, 1920, below those on the basis of which the freight charges were computed had or has been approved by the Interstate Commerce Commission, *therefore* the freight charges collected were the lawful charges under Section 208 (a) of the Transportation Act, 1920, and the decision of the Supreme Court, of Pennsylvania, Eastern District, affirming a judgment for the respondent in the amount of the difference between the freight charges so collected and freight charges on the basis of lower rates than were in effect on February 29, 1920, denied to your petitioners the right provided by said Act to collect freight charges on shipments moving between March 1, 1920 and September 1, 1920, on the basis of the freight rates in effect on February 29, 1920, unless a reduction in such rates should have been approved by the Interstate Commerce Commission.

9. Your petitioners further believe and aver that since the rates collected on the respondent's shipments were lawful rates under the provisions of Section 208 (a) of the Transportation Act, 1920, they were not unlawful by reason of any provision of the Public Service Company Law of Pennsylvania and the decision of the Supreme Court of Pennsylvania, Eastern District, amounts to a denial to your petitioners of immunity claimed by them under Section 208 (a) of the Transportation Act from liability for an action for damages for an alleged violation of the Pennsylvania Public Service Company Law.

10. As stated in the next to the last paragraph of its opinion the Supreme Court of Pennsylvania, Eastern District, holds that after March 1, 1920, the Federal Government had no authority with respect to intra-state transportation, except to prevent discrimination against interstate commerce.

This amounts to a decision that in the absence of discrimination against interstate commerce the provisions of the Transportation Act, 1920, and particularly of Section 208 (a) thereof had no application to the rates of your petitioners for transportation within the State of Pennsylvania during the period from March 1, 1920, to September 1, 1920, and is therefore a denial of the controlling effect of said Act claimed by your petitioners and is, as your petitioners believe and aver, in error.

11. In the last paragraph of its opinion, the Supreme Court of Pennsylvania, Eastern District, holds that the order for reparation of the Public Service Commission of Pennsylvania upon which this action was based was not an attempt to reduce rates but to correct charges. Said court therefore appears to conclude that a judgment enforcing the reparation order would not be in violation of the provisions of Section 208 (a) of the Transportation Act, 1920.

Since the reparation order of the Public Service Commission of Pennsylvania would require your petitioners to pay to the respondent the difference between the charges collected on respondent's shipments, which were on the basis of the rates that were in effect on February 29, 1920, and lower rates which the Public Service Commission of Pennsylvania determined would have been reasonable, your petitioners believe and aver that the court below erred and that satisfaction of a judgment for the respondent in a suit to enforce this order would accomplish a reduction in rates below those in effect on February 29, 1920, and in view of the fact that the approval of the Interstate Commerce Commission of such a reduction has not been secured would be contrary to the provisions of said Act.

12. The opinion of the Supreme Court of Pennsylvania, Eastern District, suggests also that said court was

of the view that by their failure to appeal to the courts from the decision of the Public Service Commission of Pennsylvania in so-called Complaint Docket No. 3206, in which said Commission in its report announced its opinion that a reasonable rate to have charged on respondent's shipments would have been $1.00 per ton instead of $1.10 per ton which was the rate in effect on February 29, 1920, your petitioners were precluded from setting up as a defense to the respondent's claim the lack of the Interstate Commerce Commission's approval of a reduction in the rates charged on the respondent's shipments below the rates in effect on February 29, 1920.

As the basis for this conclusion the Supreme Court of Pennsylvania, Eastern District, appears to hold that the same issues were raised in Complaint Docket No. 3206 before the Public Service Commission of Pennsylvania and were decided by the Commission as were raised by your petitioners' affidavits of defense and that having failed to appeal to the courts from this decision your petitioners, under the provisions of the Public Service Company Law of Pennsylvania, were precluded from raising these issues in defense to an action to enforce an order for reparation issued by the Commission in a subsequent proceeding before it.

Your petitioners believe that in so holding the Supreme Court of Pennsylvania, Eastern District, erred for the following reasons among others:

FIRST: The report of the Public Service Commission of Pennsylvania in said Complaint Docket No. 3206, indicates that the Commission did not pass upon these issues and did not decide that it had the power to order a reduction in freight rates on shipments transported between March 1, 1920 and September 1, 1920, without the approval of the Interstate Commerce Commission, and that it did not decide that an order for reparation on

such shipments might be enforced without such approval regardless of Section 208(a) of the Transportation Act, 1920.

SECOND: Such a decision was not necessary to the determination of other issues before the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 and would have been premature for the reason that in this proceeding the Public Service Commission made no order for reparation, expressly reserving the question of issuing such an order until a later proceeding. The approval of the Interstate Commerce Commission might have been obtained thereafter and before an order for reparation was applied for or issued and, for all that was known at the time the Commission's report in Complaint Docket No. 3206 was issued, the respondent might never have applied to it for an order for reparation.

Had the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 made an order for reparation your petitioners would have been precluded from taking an appeal to the courts by Article VI, Section 17, of the Public Service Company Law of Pennsylvania which provides, "That there shall be no appeal from any order for reparation made by the Commission, but the suit may be brought as hereinbefore provided"—and as was done here.

THIRD: The Public Service Commission of Pennsylvania, exercising its powers only by virtue of the Public Service Company Law of Pennsylvania, was neither empowered nor qualified to determine the issues raised by the affidavits of defense which are issues arising because of a Federal statute.

FOURTH: Your petitioners asserted their defense under Section 208(a) of the Transportation Act, 1920, at the earliest opportunity when such defense could be asserted by them in a court proceeding, namely, in their

affidavits of defense to the respondent's statement of claim in the lower Court.

Your petitioners therefore believe that this Court should review the record and that upon such review should conclude that the Supreme Court of Pennsylvania, Eastern District, erred in deciding that the failure of your petitioners to appeal from the opinion of the Public Service Commission in Complaint Docket No. 3206 deprived them of the defense to the respondent's cause of action asserted by them under Section 208(a) of the Transportation Act, 1920, and should conclude that such defense was seasonably claimed.

WHEREFORE your petitioners pray that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Pennsylvania, Eastern District, commanding that court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act, and your petitioners will ever pray.

THE PENNSYLVANIA RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,

By

HENRY WOLFE BIKLE,
Broad St. Station,
Philadelphia, Pa.

PARKER McCOLLESTER,
466 Lexington Ave.,
New York, N. Y.
Their Attorneys.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

PARKER MCCOLLESTER, being duly sworn, deposes and says that he is counsel for the above named petitioners, that he prepared the foregoing petition and that the allegations thereof are true to the best of his knowledge and belief.

PARKER McCOLLESTER.

Sworn to and subscribed before me this 23rd day of December, 1924.

C. A. HALPIN,
Notary Public, Westchester County. Certificate filed in New York County. N. Y. Co. Clerk No. 888; N. Y. Register No. 6150a. My Commission expires March 30th, 1926.

FILED
MAR 21 19
WM. R. STAN

IN THE

Supreme Court of the United States

[No. 230

OCTOBER TERM, 1925

THE NEW YORK CENTRAL RAILROAD COMPANY

and

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

Error to The Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR

HENRY WOLF BIKLE,
FREDERIC D. MCKENNEY,
PARKER MCCOLLESTER,
Attorneys for Plaintiffs-in-Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924. No. 791.

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR

STATEMENT

This is an action under the Public Service Company Law of Pennsylvania (Laws 1913, p. 1374; 1915, p. 779; 1917, p. 808) to enforce an order of the Public Service Commission of that State directing the plaintiffs-in-error to refund by way of reparation to the defendant-in-error the difference between freight charges paid by the defendant-in-error on shipments moving between March 1 and September 1, 1920, the so-called Guar-

anty Period during which the Federal Government guaranteed the revenues of the railroads which had been under Federal control, and rates which the State Commission found would have been reasonable.

The charges collected were based upon the freight rates lawfully in effect on February 29, 1920, and no reduction of these rates had or has been approved by the Interstate Commerce Commission. Under these circumstances the plaintiffs-in-error have denied the right of the defendant-in-error to recover and have asserted that the charges collected were lawful because of the provision of Section 208(a) of the Transportation Act, 1920 (41 Stat. L. 464), which is as follows:

> "SEC. 208 (a). All rates, fares and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the [Interstate Commerce] Commission."

The highest court in Pennsylvania having affirmed a judgment for the defendant-in-error, the Writ of Error from this court, the dismissal of which is here prayed for, was sought and allowed.

CONTENTIONS OF PLAINTIFFS-IN-ERROR

In answer to the contentions of the defendant-in-error it is submitted that under Section 237 of the Judicial Code, as amended (36 Stat. L. 1156, 38 Stat. L. 790, 39 Stat. L. 726, 42 Stat. L. 366), the Writ of Error was properly allowed and that the motion to dismiss should be denied for the following reasons:

1. There is drawn in question the validity of a statute of, or an authority exercised under the State of Pennsylvania on the ground of its being repugnant to the laws of the United States in that:

(a) The suit of the plaintiff below, the defendant-in-error here, is brought solely under the provisions of the Public Service Company Law of Pennsylvania to enforce an order of the Pennsylvania Public Service Commission for the payment of reparation.

(b) The validity of this order of the Public Service Commission of Pennsylvania is drawn in question on the ground that it is repugnant to Section 208(a) of the Transportation Act, 1920—such order being a statute of or an authority exercised under the State of Pennsylvania within the meaning of Section 237 of the Judicial Code.

(c) There is drawn in question the validity of the provisions of the Public Service Company Law of Pennsylvania as construed by the Supreme Court of Pennsylvania on the ground that said provisions are in conflict with Section 208(a) of the Transportation Act, 1920.

2. The contention that the Writ of Error should be dismissed because the decision of the Supreme Court of Pennsylvania was based in part upon the ground that

plaintiffs-in-error were concluded as to the points they sought to raise by their failure to appeal from a former decision of the Public Service Commission of Pennsylvania should not prevail since:

(a) This contention goes to the question whether the reparation order of the Public Service Commission was valid and not whether its validity is here drawn in question.

(b) If this part of the decision of the Supreme Court of Pennsylvania be construed as a decision that the Federal question was not properly raised, the facts in this case are such that this Court, rather than dismissing the Writ of Error, should itself review the record to ascertain whether the failure to appeal from the decision of the Public Service Commission in a proceeding prior to that in which the order here sued upon was made, constituted a waiver of the Federal question sought to be brought in issue in this case.

(c) This portion of the opinion of the Supreme Court of Pennsylvania is based solely upon a construction of the provisions of the Public Service Company Law of that State to the effect that under that Statute the rates charged on the shipments made by the defendant-in-error were unlawful because declared unreasonable by the Public Service Commission and because the plaintiffs-in-error did not appeal from that decision. Therefore the denial that under these facts the Public Service Company Law gave to the defendant-in-error a cause of action to enforce the reparation order and the assertion that the rates were lawful under Section 208(a) of the Transportation Act, 1920, brings in question the controlling effect of the Public Service Company Law as construed by the Supreme Court of Pennsylvania on the ground of its repugnance to Section 208(a) of the Transportation Act, 1920.

HISTORY OF THE CASE

The plaintiffs-in-error, The New York Central Railroad Company and The Pennsylvania Railroad Company, operate a through route for the transportation of coal by railroad from certain mines in Pennsylvania to Lock Haven, in the same State—the New York Central hauling the coal from the mines to Bald Eagle Junction and the Pennsylvania hauling the coal from Bald Eagle Junction to Lock Haven. This transportation was entirely within the boundaries of the State. The defendant-in-error regularly receives shipments of coal forwarded from the mines consigned to it at Lock Haven.

The lines of the plaintiffs-in-error were operated by the President through the Director-General of Railroads during the so-called period of Federal control. The Director-General, acting under the power conferred upon him by Section 10 of the Federal Control Act (40 Stat. L. 451), on or about July 1, 1919, as a part of the general increase in freight rates directed by his General Order No. 28, established a through rate of $1.10 per ton for the transportation of coal from the mines to Lock Haven—this through rate being made up of a rate of 70 cents per ton for transportation over the line of the New York Central Railroad from the mines to Bald Eagle Junction, and a rate of 40 cents per ton for transportation from Bald Eagle Junction to Lock Haven via the Pennsylvania Railroad.

The defendant-in-error filed a complaint with the Interstate Commerce Commission alleging that this through rate of $1.10 was an unreasonable rate, claiming, as was the fact, that the increase directed by General Order No. 28 in the portion of the charge for the haul over the line of the New York Central had been based upon a rate which the Public Service

Commission of Pennsylvania prior to Federal Control had held to be unreasonable.

The Interstate Commerce Commission in its report, *New York & Pennsylvania Co.* v. *Director General*, 58 I. C. C. 124 (Record pp. 27-31), held that it was immaterial how the through rate of $1.10 had been constructed and that the only question to be determined was as to the justness and reasonableness of this rate, the manner in which the rate was arrived at being "only one of elements to be considered in determining the issue" (Record p. 31). This Commission also held "that the rates attacked were not unreasonable or otherwise unlawful as alleged," and ordered the dismissal of the complaint (Record p. 32).

The through rate of $1.10 remained in effect from July 1, 1919, during the balance of the period of Federal control and was in effect on February 29, 1920, and lawfully so, as the Interstate Commerce Commission held in the aforesaid decision.

Shortly prior to the termination of Federal control the defendant-in-error filed a complaint with the Public Service Commission of Pennsylvania, referred to in the record herein as Complaint Docket No. 3206, in which it alleged that the through rate of $1.10 would be unlawful in violation of the Public Service Company Law of Pennsylvania after the termination of Federal control. Hearing was held upon this complaint, but the decision of the Public Service Commission was not announced until August 17, 1921, more than a year after Federal control had ended.

In its report (Record pp. 7-12) the Public Service Commission announced the conclusion that the just and reasonable through rate from the mines to Lock Haven, Pa., for the period from March 1, 1920, to August 25,

1920, both inclusive, would have been $1.00 per ton (Record p. 11), and effective August 26, 1920, $1.40 per ton (Record p. 12).

At the time it announced this decision the Public Service Commission made an order, dated August 16, 1921, directing the plaintiffs-in-error to establish within fifteen days thereafter a through rate of $1.40 per ton to be applied in the future. It issued no order, however, directing the plaintiffs-in-error to make any adjustment of their freight charges or to refund any portion thereof by way of reparation with respect to shipments which had moved during the period prior to the date of the report, but said "upon the presentation of a petition accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined" (Record p. 12).

The plaintiffs-in-error did not seek to oppose the Public Service Commission's order with respect to rates for the future nor to attack its conclusions as contrary to the evidence. Neither did they contest the jurisdiction of this Commission to consider and pass upon the reasonableness of their rates for the entire period subsequent to the termination of Federal control. They had contended before the Commission that pursuant to Section 208(a) of the Transportation Act, 1920, the rate of $1.10 which was in effect on February 29, 1920, remained the lawful rate until thereafter changed by the State authorities and that therefore the burden of proof was upon the defendant-in-error to show that the rate was unreasonable (Record p. 10). It was also their position that the authority of the State Commission to declare the rates unreasonable subsequent to Federal control was qualified by the proviso of Section 208(a) of the Transportation Act, 1920, that no rate should be reduced prior to September 1, 1920, without the approval of the Inter-

state Commerce Commission and they believed that this proviso would prevent the enforcement of any order made by the Public Service Commission of Pennsylvania as to the shipments moving prior to September 1, 1920, which sought to give effect to a rate lower than the rate which was in effect on February 29, 1920, unless, before such order was made or suit brought for its enforcement, the approval of the Interstate Commerce Commission of the reduction had been obtained (Record, p. 80).

However, since the Public Service Commission in Complaint Docket No. 3206 issued no order with respect to shipments moving during the so-called Guaranty Period; since the objection which the plaintiffs-in-error would have had to such an order did not run to the only order which the Commission did make prescribing rates for the future; since the Public Service Commission had plainly announced that it would entertain a *further* proceeding upon the reparation issue and since finally it was not impossible that before the issuance of an order affecting shipments during the Guaranty Period or a suit for the enforcement of such order the approval of the Interstate Commerce Commission to a reduction in rates might be obtained, the plaintiffs-in-error conceived that an appeal to the courts at that time would not properly raise the question of the validity of such an order with respect to the Guaranty period and would be wholly inappropriate. They were confirmed in this view by the fact that as the Guaranty period had long since passed such an order would have to be in the form of a reparation order and by the further fact that Article VI, Section 17, of the Public Service Company Law of Pennsylvania, which provides for appeals to the Superior Court of the State from findings or determinations of the Commission, contains the proviso that "there shall be no appeal from any order for reparation made by the Commission, but the suit may be brought as hereinbefore

provided"—the suit referred to being a suit for recovery of reparation in which the reparation order of the Commission shall be *prima facie* evidence as provided in Article V, Section 5, of the same Act.

Thereafter the defendant-in-error filed a new complaint or petition with the Public Service Commission for the recovery of reparation on past shipments, this complaint being referred to in the record as Complaint Docket No. 4738. In this proceeding although the plaintiffs-in-error contended that as to the shipments moving during the Guaranty Period a valid reparation order could not be issued since the Interstate Commerce Commission had not approved a reduction in the rates for this period below the $1.10 rate in effect on February 29, 1920, the Public Service Commission issued its report holding that the defendant-in-error was entitled to reparation (Record pp. 15-18).

In order that the question of the effect of Section 208(a) of the Transportation Act, 1920, upon the claim for refund of charges on shipments during the Guaranty Period might conveniently be litigated, the State Commission at the request of the parties made two separate orders, one relating only to the shipments during the Guaranty Period and the other relating to the shipments transported thereafter. By both orders the plaintiffs-in-error were directed to pay to defendant-in-error the amounts by which the charges collected based on the $1.10 rate, found reasonable by the Interstate Commerce Commission, exceeded the charges which would have accrued on the basis of the lower rates found reasonable by the State Commission (Record pp. 19, 20).

The plaintiffs-in-error not denying the validity of the second order paid the reparation in the amount ordered. They believed, however, that the first order was invalid by reason of Section 208(a) of the Transportation Act,

1920, as was the Public Service Company Law if construed to give a cause of action for its enforcement, and therefore declined to comply with the first reparation order.

Thereupon the defendant-in-error instituted this suit in the Court of Common Pleas of Clinton County, Pennsylvania, to recover the amount of the reparation ordered by the Public Service Commission in its Order No. 1 and to enforce compliance with said order (Record pp. 1-21). The plaintiffs-in-error duly filed their affidavits of defense (Record pp. 22-36) alleging, among other things, as follows:

> 14. For a separate and complete defense to the plaintiff's Statement of Claim, this defendant avers that the New York Central Railroad Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as *New York & Pennsylvania Company* v. *Director General,* 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit "A"; this defendant alleges that by Section 208 (a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission

has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including Section 208 (a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law.

15. This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, and attached to plaintiff's statement of Claim as "Exhibit G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was, therefore, null and void.

16. This defendant alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff has no cause of action under Section 5 of Article 5 of the Public Service Company Law."

Defendant-in-error obtained a rule for judgment for want of sufficient affidavits of defense on the grounds (1) that since no appeal had been taken from the State Commission's decision in Complaint Docket No. 3206, that decision was conclusive as to the issues raised; (2) that the Transportation Act did not render the Interstate Commerce Commission's approval of the State Commission's order necessary, and (3) that the rates in question were subject to the exclusive authority of the State (Record pp. 36, 37).

The Trial Court made the rule absolute and gave

judgment for the defendant-in-error, which judgment was affirmed by the Supreme Court of the State (Record pp. 89-95. *New York & Pennsylvania Co.* v. *New York Central R. R. Co.*, 126 Atl. 382). A petition for reargu-ments was denied on September 29, 1924. It is this de-termination, review of which is sought here.

ARGUMENT

I.

The Writ of Error was properly allowed since there was drawn in question the validity of a statute or an authority exercised under the State of Pennsylvania on the ground of its being repugnant to Section 208 (a) of the Transportation Act, 1920, and the decision of the Supreme Court of Pennsylvania was in favor of their validity.

(a) This suit was brought under the provisions of the Public Service Company Law of Pennsylvania and to enforce an order of the Public Service Commission of that State.

This suit was brought solely under Article V, Section 5, of the Public Service Company Law of Pennsylvania, which is, in part, as follows:

> "If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named therein to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be *prima facie* evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received."

The reparation order of the Public Service Commission of Pennsylvania was alleged in the statement of claim of the plaintiff below, the defendant-in-error here, as the basis of its suit. If it is the basis of a suit and *prima facie* evidence therein it is because it is made so by the portion of the State statute above quoted. The right of the defendant-in-error to recover, therefore, depends upon the validity of the order and upon the validity of the Public Service Company Law making that order *prima facie* evidence and giving to the defendant-in-error a cause of action for its enforcement. The State court having held that the defendant-in-error is entitled to recover has decided in favor of the validity of the order and of this statute if their validity is drawn in question.

(b) The Validity of the Order of the Public Service Commission is drawn in Question on the Ground of its being repugnant to Section 208 (a) of the Transportation Act, 1920.

In their affidavits-of-defense to the statement of claim of the plaintiff below, the defendant-in-error here, the plaintiffs-in-error denied the validity of the order of the Public Service Commission of June 20, 1922, in Complaint Docket No. 4738 upon which this suit is based (Record pp. 25, 26, 36). This contention proceeded upon the grounds (1) that the rate charged was a lawful rate under the provisions of Section 208(a) of the Transportation Act, 1920, and therefore was not unlawful in violation of the Public Service Company Law; (2) that therefore the order of the Public Service Commission based upon the theory that the rate was unlawful in violation of the Public Service Company Law was void, and (3) that the order would accomplish a reduction in the rates for the Guaranty Period below the level of the rates in effect at the termination of Federal control, without the approval of the Interstate Commerce Commission as required by Section 208(a) of the Transportation Act, 1920 (Record pp. 22-36).

(c) The Order of the Public Service Commission was a Statute of or Authority exercised under a State within the Meaning of Section 237 of the Judicial Code.

This court has held that a decision of a State court sustaining as valid an order of a State administrative tribunal may be reviewed on Writ of Error. *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission,* 249 U. S. 422; *Pennsylvania R. R. Co.* v. *Public Service Commission,* 250 U. S. 566.

It may be urged that there is a distinction between orders of an administrative tribunal looking to the future as did those considered in the two cases cited and an order for reparation such as is here involved. On this theory the Supreme Court of California has recently sustained a reparation order of the Railroad Commission of that State relating to shipments moving during the Guaranty Period the validity of which was attacked upon apparently the same grounds as is the validity of the order of the Pennsylvania Public Service Commission here in issue. *Southern Pacific Co.* v. *Railroad Commission,* 231 Pac. 28. We believe that this decision is clearly erroneous and that the theory of the court proceeds from a mistaken application of language in cases where different issues were presented.

We submit, however, that whatever may be the character of a reparation order in other circumstances, nevertheless, when the effect of the reparation order here in question is considered in the light of the obvious purpose of the Congress in passing Section 208(a) of the Transportation Act, 1920, it must be held that the reparation order and the determination of the Public Service Commission upon which it was based constituted a legislative rather than a judicial act, whose validity may as properly be reviewed on Writ of Error as the validity of an order fixing rates for the future.

It is, we believe, unquestioned that Section 208(a) of the Transportation Act, 1920, was passed to protect the Federal government in its guaranty of the revenues of the carriers during the period of six months following the termination of Federal control from an undue burden resulting from efforts to reduce their rates below the levels which were in effect at the time Federal control ended. *New York Central R. R. Co.* v. *Public Service Commission,* 268 Fed. 558, 560.

The defendant-in-error filed its complaint, Docket No. 3206, with the Public Service Commission of Pennsylvania shortly prior to the termination of Federal control and sought an order of that Commission requiring the railroads to reduce their rates when Federal control should have ceased. It is clear that if the State Commission had concluded its proceeding and made its determination in March, 1920, and had then issued an order directing the railroads to establish the rate of $1.00 for the period from March 1st to September 1st, 1920, the order would have been invalid unless approved by the Interstate Commerce Commission or unless the Transportation Act, 1920, had no application to intrastate rates. Being an order fixing rates for the future it would have been legislative in character and a decision sustaining its validity would have been reviewable on Writ of Error. *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362. We submit that the mere fact that the Public Service Commission did not complete its consideration and issue its order until after the Guaranty Period had ended does not change the essential character of its action and that while its order may of necessity be in the form of a reparation order, it is, nevertheless, in substance an order directing the retroactive establishment of a rate and therefore is in reality legislative or administrative. It is certainly clear that the purpose of the Congress in adopting Section

208(a) of the Transportation Act, 1920, to protect the revenues of the carriers would be defeated quite as effectively by such an order as by a prospective order fixing a reduced rate for the Guaranty Period.

(d) The Validity of the Public Service Company Law of Pennsylvania is drawn in Question on the Ground that it is in conflict with Section 208 (a) of the Transportation Act, 1920.

The defendant-in-error has no cause of action unless the rates charged on its shipments were unlawful in violation of the Public Service Company Law of Pennsylvania. The State Commission found that the rates were in violation of the State statute and made the order here sued on predicated upon such finding. The State Court has declared that the order is valid and that the Public Service Company Law gives the defendant-in-error a cause of action for its enforcement.

The plaintiffs-in-error on the other hand assert that so far as the shipments involved in this suit are concerned, the Public Service Company Law was superseded by the Transportation Act, 1920; that the rates charged were lawful under that Act, and that therefore the defendant-in-error is without a cause of action under the Public Service Company Law to enforce the order of the State Commission.

In *Northern Pacific Railway Co.* v. *North Dakota*, 250 U. S. 135, this Court, on Writ of Error, reviewed and reversed a decision of a State court sustaining the allowance of a writ of mandamus requiring a railroad to charge no higher rates than those fixed by State law. The Writ of Error was sought on the ground that the State law was inapplicable, having been superseded by the Federal Control Act and the rates objected to having been established pursuant to that act. In the case at bar the rates charged were likewise established pursuant to the Federal Control Act. The Transportation Act,

1920, whose provisions are relied upon, was an act relating to the return of the railroads to their owners, as the Federal Control Act provided for their taking over by the government. The situation presented in the case at bar is in all respects similar to that considered in the *North Dakota case* and it is submitted that if a Writ of Error was proper there it is equally so here.

Whichever of the reasons suggested in the opinion of the Pennsylvania Supreme Court determined its decision, we submit that this conclusion is required.

The State Court says that in the absence of discrimination against interstate commerce the provisions of the Public Service Company Law were applicable with full force and effect to intrastate rates after the termination of Federal control (Record pp. 74, 75). We contend that the rates charged were lawful under Section 208(a) of the Transportation Act, 1920, that the provisions of that Act were controlling and therefore that the rates were not unlawful under the Public Service Company Law.

Again the defendant-in-error contends that the State court has decided that the order of the Public Service Commission did not constitute a reduction of the rate. It is true as we concede that if this be so the order was not invalid under Section 208(a) of the Transportation Act, 1920, and the provisions of the Public Service Company Law were controlling, but we cannot see on what theory the enforcement of the order would not be considered a reduction since it would give effect to a rate which was lower than the rate which was in effect on February 29, 1920. This question, however, is one which arises in considering the merits of the case and not in considering whether the validity of a State statute or authority has been drawn in question.

The opinion of the State court suggests as another ground of its decision the failure of the plaintiffs-in-error

to appeal from the decision of the Public Service Commission in Complaint Docket No. 3206. But to the extent that this is held by the court to require judgment for the defendant-in-error, it must be because the court construes the provisions of the Public Service Company Law as rendering the determination of the State Commission conclusive if unappealed from and creating a right to reparation in a subsequent proceeding. If this is a proper construction of the Public Service Company Law, then it is submitted that its validity is clearly brought in issue by the contention of the plaintiffs-in-error that, notwithstanding the failure to appeal, a judgment for the defendant-in-error would be in violation of Section 208(a) of the Transportation Act, 1920.

We, therefore, submit that the validity of a State statute is here drawn in question within the meaning of Section 237 of the Judicial Code and that the Writ of Error was properly allowed.

II.

The contention that the decision of the Supreme Court of Pennsylvania was based in part upon the ground that the plaintiffs-in-error were concluded from setting up their defense under Section 208 (a) of the Transportation Act, 1920, by their failure to appeal from the decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 does not afford a ground for dismissing the Writ of Error.

(a) This Contention goes to the question whether the Reparation Order of the Public Service Commission was Valid and not whether its Validity is here drawn in Question.

We conceive that on the motion to dismiss the Writ of Error the question before the court is not whether the State statute or order was invalid, a question which goes to the merits of the case, but whether their validity has been drawn in question.

Insofar as the opinion of the State Court suggests as a reason for its decision the failure to take an appeal from the decision of the Public Service Commission in Complaint Docket No. 3206, it does so upon the ground that the provisions of the Public Service Company Law made the reparation order of the Commission, upon which suit is brought and which in turn was predicated upon the earlier decision of the Commission, valid and incontestable insofar as any objection under the Transportation Act, 1920, is concerned. The affidavits of defense, on the other hand, by asserting that the rates were lawful under the Transportation Act, 1920, regardless of the provisions of the State law, directly put in issue not only the validity of the State Commission's order, but the controlling effect of that part of the Public Service Company Law which, as construed by the State Court, would make that order incontestable because of the failure to appeal in Complaint Docket No. 3206, and would give a cause of action thereon.

(b) The Circumstances of this Case are such that this Court should itself review the Record to ascertain whether the Federal Question sought to be put in issue was waived by the failure of the plaintiffs-in-error to appeal from the first Decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206.

In *Erie* v. *Purdy*, 185 U. S. 152, this court said:

> "The question whether a right or privilege claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court is itself a Federal question in the decision of which this court on writ of error is not concluded by the view taken by the highest court of the State."

It has been held that the proper time and manner to raise a Federal question is upon the pleadings in the trial court. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291.

The objection to the validity of the reparation order of the Public Service Commission and of the Public Service Company Law in giving a cause of action on such order was raised at the earliest possible moment that the order was made the subject of litigation, namely, in the affidavits of defense to the statement of claim. Under the Public Service Company Law this was the first opportunity which the plaintiffs-in-error had to object to the reparation order itself—the Public Service Company Law expressly prohibiting an appeal from a reparation order and providing for objection thereto only in a suit brought for its enforcement.

The decision of the Pennsylvania Supreme Court is not that the Federal question was raised in an untimely manner in this suit, but that it should have been raised by an appeal from a decision of the Public Service Commission in an earlier case than that in which the order here in suit was made. We know of no decisions of this court which have gone so far as to hold that a Federal question has not been properly raised under these circumstances.

Our opponents urge that the decision of the State Court that under the State law the defense here relied upon was waived by the failure to appeal from the Commission's decision in Complaint Docket No. 3206 is binding upon this Court. This court, however, has held that in spite of a decision of a State Court it will examine for itself to ascertain whether there is any basis for a finding that an objection to a State action on Federal grounds has been waived. *Union Pacific R. R.* v. *Public Service Commission,* 248 U. S. 67. It is submitted that the circumstances of the present case are such as to bring it within this principle. We believe that this Court should certainly review the record when it appears that the objections to the validity of the statute and the reparation order raised by the affidavits of defense did not exist at

the time of the decision in Docket No. 3206, could not have been made the subject of an appeal from that decision and therefore could not have been waived by the failure to take an appeal therefrom.

The decision of the Public Service Commission in Complaint Docket No. 3206 speaks for itself (Record pp. 7-12). We submit that there is nothing in the language of the Commission to indicate that it was the intention of the Commission to hold that an order for reparation which it might issue in a subsequent proceeding might thereafter be enforced without the approval of the Interstate Commerce Commission. The Public Service Commission merely announced that it would entertain a petition for an award of reparation. What might thereafter happen was a matter of speculation only. In spite of the Commission's invitation the defendant-in-error might not have sought reparation, or it might have failed to prove the payment of the freight charges or, before the State Commission was asked to make its reparation order, the Interstate Commerce Commission might have given its approval to a reduction in the rates during the Guaranty Period. In any of these events the issues which are raised by the affidavits of defense would not have arisen. How can it be contended that the State Commission anticipated all of these possibilities? The opinion of the State Court views the report of the Commission in Complaint Docket No. 3206 as a holding that if a petition for reparation should later be filed, if the petitioner should prove its claim to reparation, if the interstate Commerce Commission should not by that time have approved a reduction of the rates and if objection to the issuance of a reparation order should then be made on the ground that it violated the Transportation Act, 1920, the reparation order would nevertheless be valid. Surely it is impossible to read all of this into the language of the State Commission's decision in Com-

plaint Docket No. 3206. If such was not its effect, then the issues raised by the affidavits of defense could not have been the subject of an appeal therefrom. And, if the Commission had attempted to announce such a decision it would have been conjectural and an appeal to the courts therefrom would have been premature.

The Supreme Court of Pennsylvania, itself, so held in the case of *Lehigh & New England* v. *Public Service Commission,* 277 Pa. 493, a decision which is irreconcilable with its decision in the present case. In the *Lehigh & New England Case* it appeared that the State Commission had, as in Complaint Docket No. 3206, announced a decision that rates were unreasonable during the Guaranty Period and would be unreasonable for the future, had made an order fixing the rates for the future, but as to the Guaranty Period had simply stated that it would entertain further proceedings to determine the complainant's right to reparation. The railroad followed the course which the State court has held the plaintiffs-in-error here should have pursued and appealed to the courts directly from this decision of the State Commission. In its appeal it attacked the action of the State Commission both in fixing rates for the future and in announcing that it would entertain further proceedings to determine the complainant's right to reparation on shipments during the Guaranty Period. In respect to so much of the appeal as related to reparation on the shipments moving during the Guaranty Period the Superior Court in its opinion, *Lehigh & New England* v. *Public Service Commission,* 79 Pa. Sup. Ct. 540, speaking through Mr. Justice Linn, held (pp. 554, 555):

> "4. Appellant objects that the commission retained 'jurisdiction of the case in the matter of reparation.' It contends that the Transportation Act prohibits granting reparation by providing in Section 208a that the rates in effect on Feb-

ruary 29, 1920, when federal control terminated, 'shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, but prior to September 1, 1920, no such rate, fare or charge shall be reduced * * * unless such reduction or change is approved by the (Interstate Commerce) Commission.' During federal control both interstate and intrastate rates were made effective from time to time by the railroad administration, pursuant to Congressional authority. Necessarily during that period, state statutes prescribing how intrastate rates should become effective, were in abeyance. N. P. R. Co. v. North Dakota, 250 U. S. 135. In order that there might be no question that the rates prescribed by the railroad administration, and not the intrastate rates which had been effective pursuant to state statutes when Federal control was taken, should continue effective on March 1, 1920, section 208(a) prescribed the status of the rates on the first of March, 1920, and until changed as specified. *Whether or not the section prohibits the granting of reparation is not before us on this record; at best that part of the order is interlocutory. There is nothing showing what questions may be raised on the subject.* Moreover, article VI, section 17 of the Public Service Company Law, July 26, 1913, P. L. 1374, provides that ' * * * There shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided.' Article V, section 5, provides for reparation specified, and it is apparent from the opinion written by Mr. Justice Simpson, in N. Y. & P. Co. v. N. Y. C. R. R. Co., 267 Pa. 64, that article V, section 5, 'plainly requires the petition for reparation to be filed after the final decision on the question of the reasonableness of the rates.' Accordingly, the power company's prayer for reparation contained in the complaint that the rate was unreasonable, perhaps amounts to no more than notice that claim for reparation will be made if the rate be held unreasonable. *We cannot reverse because the*

commission has given notice that it will hear a claim for reparation if presented by the power company.'' (Italics ours.)

This decision was affirmed by the Supreme Court of the State in the opinion above referred to.

As construed by the Supreme Court of Pennsylvania in the *Lehigh & New England Case* and as construed by the same court in the case at bar, the Public Service Company Law of Pennsylvania does not permit raising the objection that a decision of the State Commission is contrary to Section 208(a) of the Transportation Act, 1920, by an appeal therefrom prior to the entry of an order for reparation, and then if an appeal is not taken prior to the entry of a reparation order prohibits raising the objection after the order has been issued. In other words, the State statute, as the court construes it, prevents any review of the Federal question. It is plain that either the State court must be wrong or that a State law which renders it impossible to obtain an adjudication of a Federal question is invalid. Whichever may be the fact the situation is certainly one which calls for a review of the State court's decision by this Court.

(c) The Federal Question goes to the entire Case, including the Effect of the Failure to appeal from the Decision of the Public Service Commission in Complaint Docket No. 3206.

The defendant-in-error in support of its motion cites decisions of this court to the effect that a decision of a State court will not be reviewed if placed upon an independent State ground broad enough to sustain the judgment.

It is not contended that the Federal question here presented was not discussed and decided by the State court. The opinion of that court is sufficient to indicate that the

State court did undertake to pass upon the question. (Record p. 94). This Court has held that when a Federal question has been expressly passed upon by a State Court its decision may be reviewed. *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248.

Even if, however, the Supreme Court of the State based its conclusion on the failure to appeal from the decision of the Public Service Commissionin Complaint Docket No. 3206 we submit that this is not a decision upon an independent State ground since the objection under the Federal statute goes to the entire case and the decision even on this apparent State ground involves the determination of the Federal issue.

It has been held that where, although a State court seeks to base its decision upon a State law, nevertheless, the Federal question raised goes to the whole case, this Court will review the decision of the State Court. *West Chicago R. R.* v. *Chicago,* 201 U. S. 506.

This has been held to be so even where the State court fails to discuss the Federal question. *Harding* v. *Illinois,* 196 U. S. 78; *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427.

In the case at bar it is submitted that the Federal question goes to the entire case including the issue under the provisions of the State law with respect to appeals from decisions of the State Commission. The decision of the State court on this feature of the case is based upon the provisions of the Public Service Company Law, and depends upon the controlling effect of that statute with respect to the rates on the shipments involved and the decision of the State Commission with reference thereto. Its decision in favor of defendant-in-error amounts to a determination that the Public Service Company Law is valid and controlling with respect to the facts of this case, regardless of the requirements of the

Transportation Act, 1920. We assert on the other hand that whatever may be the provisions of the Public Service Company Law, since the rates charged on the shipments involved in this case were the rates in effect on February 29, 1920, and since the Interstate Commerce Commission has approved no reduction in those rates, they were lawful under the Federal Statute, and a State statute which would give a cause of action for a refund of a portion of those rates is invalid.

CONCLUSION

For the reasons herein submitted it is urged that the motion to dismiss the Writ of Error should be denied.

Respectfully submitted,

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FILED
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WM. R. STANS
CL

Supreme Court of the United States

[No. 230]

OCTOBER TERM, 1925

NEW YORK CENTRAL RAILROAD COMPANY
and
PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR

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Supreme Court of the United States

OCTOBER TERM, 1925. No. 230.

NEW YORK CENTRAL RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

NEW YORK & PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR

Reference to the Official Report of the Opinion Delivered in the Court Below

New York & Pennsylvania Co. v. *New York Central R. R. Co. et al.*, 281 Pa. 257.

Statement of the Grounds on which the Jurisdiction of this Court is invoked

1. Judgment for the defendant-in-error in the sum of $6,546.43 was entered in the Court of Common Pleas of Clinton County, Pennsylvania, on July 23, 1923 (R. 2). On appeal this judgment was affirmed by the Supreme Court of Pennsylvania, Eastern District, April 21, 1924, *New York & Pa. Co.* v. *N. Y. C. R. R.*, 281 Pa. 257. After the presen-

tation of a petition for reargument the opinion filed by this Court was withdrawn May 19, 1924. The judgment was again affirmed July 8, 1924. A second petition for reargument was filed. On September 29, 1924, the opinion was modified and reargument was denied (R. 49, 50).

2. This suit was brought under the provisions of the Public Service Company Law of Pennsylvania (Act July 26, 1913, P. L. 1374, as amended) to enforce a reparation order made by the State Commission awarding to the defendant-in-error reparation in the amount that the freight charges collected by the plaintiffs-in-error from the defendant-in-error on certain shipments of coal transported between March 1, 1920, and September 1, 1920, exceeded lower charges which the State Commission found would have been reasonable (R. 4-6). It was alleged that the freight charges collected were unreasonable and in violation of the Public Service Company Law of the State as declared by the Public Service Commission.

The freight charges collected were based upon the rate of $1.10 per ton in effect on February 29, 1920. This rate had been held by the Interstate Commerce Commission to be a just, reasonable and lawful rate for the period prior to and including February 29, 1920, and no reduction therein had been approved by the Interstate Commerce Commission as applied to shipments transported prior to September 1, 1920.

On these facts the plaintiffs-in-error claimed in the Court below that the charges collected were lawful under the Transportation Act, 1920 (Act of Congress, Feb. 28, 1920, 41 Stat. L. 456) and therefore could not be unlawful in violation of the Public Service Company Law of the State; that the reparation order of the State Commission was null and void and that the Public Service Company

Law of the State afforded no cause of action for its enforcement because it and the order thereunder were in conflict with Section 208(a) of the Transportation Act, 1920 (41 Stat. L. 464), providing that all rates in effect on February 29, 1920, on the lines of carriers subject to the Interstate Commerce Act should continue in effect until changed as therein provided and that no reduction in such rates should be made prior to September 1, 1920, without the approval of the Interstate Commerce Commission (R. 22-36).

The lower Court ruled that after March 1, 1920, intrastate rates were subject to the exclusive control of the State Commission; that beginning with March 1, 1920, the determination of the reasonableness of charges as to intrastate traffic was solely within the jurisdiction of the State authorities, and that the reparation order of the State Commission should be enforced (R. 94).

In the Court below the defendant-in-error, besides asserting the exclusive authority of the State law, claimed that the failure of the plaintiffs-in-error to appeal to the courts from a decision of the State Commission in an earlier proceeding constituted a waiver by them of the contention that the right of recovery of the defendant-in-error was prevented by Section 208(a) of the Transportation Act, 1920, and that therefore this defense could not be asserted in the present suit (R. 36, 39). In answer to this the plaintiffs-in-error claimed that the issues raised by their defense were not and could not have been raised in the earlier proceeding before the State Commission; that these issues were not decided by the State Commission and therefore could not have been reviewed on appeal from the State Commission's decision; that any appeal from this decision would have been premature and ineffectual to raise the

issues for adjudication (R. 78, 83); that if the Public Service Company Law was applicable at all, the failure to appeal from the earlier decision of the State Commission was in accordance therewith since this statute, as previously construed by the highest Court of the State, rendered an appeal improper to raise the issue of the validity of a reparation order (R. 62, 84, 95); and finally that if, as plaintiffs-in-error contended, the rates charged were lawful under the Transportation Act, 1920, they were not subject to the State Law and the provisions of the State Law relied upon by the defendant-in-error were of no effect (R. 86).

With respect to these conflicting claims the lower Court ruled that the federal issue raised by the affidavits of defense had been raised before and decided by the State Commission in the earlier proceeding (R. 91, 92); that the failure of the plaintiffs-in-error to appeal from this decision was a waiver of their claim (R. 92, 93); that regardless of the provisions of the Transportation Act, 1920, the Public Service Company Law was controlling (R. 94), and that thereunder the defendant-in-error was entitled to judgment (R. 95).

3. The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (Act of Congress, Mar. 3, 1911, 36 Stat. L. 1156; Act of Congress, Dec. 23, 1914, 38 Stat. L. 790; Act of Congress, Sept. 6, 1916, 39 Stat. L. 726; Act of Congress, Feby. 17, 1922, 42 Stat. L. 366).

4. The cases believed to sustain the jurisdiction of this Court are the following:

(a) That the writ of error was seasonably applied for:

United States v. *Elliott,* 223 U. S., 524;
Cherokee Nation v. *Whitmore,* 223 U. S. 108;
Kingman v. *Western Mfg. Co.,* 170 U. S. 675;
Texas & Pacific Ry. Co. v. *Murphy,* 111 U. S. 488.

(b) That the case comes within Section 237 of the Judicial Code, as amended, in that there is drawn in question the validity of a law of or authority under a State on the ground that they are in conflict with a federal statute and the decision of the State Court was in favor of their validity:

Dahnke-Walker Co. v. *Bondurant,* 257 U. S. 282;
Ohio Valley Co. v. *Ben Avon Borough,* 253 U. S. 287;
Pennsylvania R. R. Co. v. *Public Service Comm.,* 250 U. S. 566;
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Lake Erie & W. R. R. Co. v. *Public Utilities Comm.,* 249 U. S. 422;
Arkadelphia Co. v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134;
Northern Pacific Ry. Co. v. *Solum,* 247 U. S. 477.

(c) That the decision of the State Court that the defendant-in-error is entitled to judgment because of the failure of the plaintiffs-in-error to appeal from a decision of the State Commission in an earlier proceeding than that in which the order here sued upon was made was not a decision on an independent state ground sufficient to sustain the judgment, conclusive on this Court and depriving it of jurisdiction:

First National Bank v. *Anderson,* decided Jan. 4, 1926, 46 S. Ct. 135;
Corn Products Refining Co. v. *Eddy,* 249 U. S. 427, 432;
Union Pacific R. R. Co. v. *Public Service Comm.,* 248 U. S. 67, 69;
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Carter v. *Texas*, 177 U. S. 442, 447;
North Carolina R. R. Co. v. *Zachary*, 232 U. S. 348;
Mitchell v. *Clark*, 110 U. S. 633, 645.

Statement of the Case

This is a suit brought by the defendant-in-error in the Court of Common Pleas of Clinton County, Pennsylvania, under Article V, Section 5, of the Public Service Company Law of that State (P. L. 1405) to enforce an order of the State Public Service Commission in a proceeding entitled *New York & Pennsylvania Co.* v. *N. Y. C. R. R. Co.,* P. U. R. 1924, E. p. 803 (abstracted), herein referred to as *Docket No. 4738,* directing the plaintiffs-in-error to pay reparation to the defendant-in-error in the amount of the difference between the freight charges paid by the defendant-in-error and charges which the State Commission found would have been reasonable on shipments of coal transported from mines in Pennsylvania to Lock Haven, Pennsylvania, during the period between March 1 and September 1, 1920, the so-called Guaranty Period.

The plaintiffs-in-error are common carriers engaged in interstate commerce and in intrastate transportation within the State of Pennsylvania. A line of the New York Central runs from mines in the so-called Munson and Hawk Run Districts of Pennsylvania to Bald Eagle Junction, Pennsylvania, where there is a connection with a line of the Pennsylvania Railroad leading thence to Lock Haven, Pennsylvania. The defendant-in-error is a large paper manufacturing company having a plant located at Lock Haven, Pennsylvania, and was the consignee of numerous shipments of coal transported from mines in the Munson and Hawk Run Districts to Lock Haven over the lines of the New York Central and the Pennsylvania Railroad just described (R. 4).

During the so-called Federal control period (December 28, 1917 to February 29, 1920) the lines of the Pennsylvania

Railroad and the New York Central Railroad were taken over by the President and were operated by him through the Director General of Railroads (R. 23, 33). On July 1, 1919, the Director General made effective a rate of 65 cents for the haul over the line of the New York Central from the mines to Bald Eagle Junction, the rate for the haul over the Pennsylvania from Bald Eagle Junction to Lock Haven being 45 cents. Thus the through combination rate became $1.10. This was an increase over the rate previously in effect (R. 28).

On a complaint to the Interstate Commerce Commission by the defendant-in-error here the through rate of $1.10 was found by that tribunal to be a just and reasonable rate for the period of Federal control (R. 25, 27-32, 35). *New York & Pennsylvania Co.* v. *Director General,* 58 I. C. C. 124.

The through rate of $1.10 was in effect on February 29, 1920, when Federal control terminated (R. 25, 35). This was the rate which was charged on the shipments of coal involved in this suit which were transported between March 1 and August 26, 1920 (R. 5), when following the Interstate Commerce Commission's decision in *Increased Rates, 1920, Ex Parte 74,* 58 I. C. C. 220, the rate of $1.10 was increased 40 per cent. to $1.54 (R. 25, 35).

The Interstate Commerce Commission has never approved a reduction in the through rate on coal from the mines to Lock Haven below the rate of $1.10 in effect on February 29, 1920 (R. 25, 35).

Shortly prior to March 1, 1920, when Federal control was about to terminate, the defendant-in-error filed a complaint with the Public Service Commission of Pennsylvania alleging that after the termination of Federal Control—

namely, after March 1, 1920—the through rate of $1.10 would be unlawful under the Public Service Company Law of the State because in excess of the rate prescribed by the State Commission in an order made by it on December 10, 1917, and that it would also be unreasonable in violation of the Public Service Company Law. The proceeding on this complaint, *New York & Pennsylvania Co.* v. *N. Y. C. R. R. Co.*, P. U. R., 1921, E. p. 80, was what is herein referred to as *Docket No. 3206* on the docket of the State Commission. A hearing was held before the State Commission in March, 1920, but no decision was announced by it until August 17, 1921, nearly a year after the end of the period of six months following the termination of Federal control, hereafter called the Guaranty Period, during which, by the terms of Section 209 of the Transportation Act, 1920 (41 Stat. L. 464), the Federal Government guaranteed the earnings of the carriers which had been under Federal control.

By its decision in *Docket No. 3206* the State Commission rejected the contention of the New York & Pennsylvania Company that the rate of $1.10 was unlawful merely because it was in excess of the rate prescribed by the same Commission in December, 1917 (R. 9). The State Commission concluded, however, that for the period from March 1, 1920 to August 25, 1920, the through rate of $1.10 had been unreasonable and that this rate should have been $1.00 per ton. For the period subsequent to August 26, 1920, and for the future, it found that the rate should have been and should be $1.40 instead of $1.54 (R. 11, 12).

This decision of the State Commission not being announced until more than one year after the transportation during the Guaranty Period had been performed, the only order which the State Commission could have made to give effect to its conclusion with respect to such transportation

would have been an order for the payment of reparation. The Commission, however, made no such order at this time, the only order which it did make being an order fixing the rates for the future (R. 12, 13, 14). As to reparation the Commission said: "Upon the presentation of a petition accompanied by the supporting data reparation will be awarded for freight charges paid in excess of the rates herein determined" (R. 12).

The carriers concluded to comply with the order of the State Commission fixing the rates for the future and therefore sought no appeal from this feature of the Commission's decision. Since the determination of the Commission as to the rates which would have been reasonable for the period from March 1, 1920 to September 1, 1920, was a determination as to past rates which could affect only the question of reparation, the carriers believed that an appeal from this decision of the Commission as to the reparation feature was not permitted by the Public Service Company Law and moreover that since no reparation order had been issued and since the New York & Pennsylvania Company might fail to prove its right to reparation no appeal could properly be taken at that time to raise the issue of the enforcibility of a reparation order under the provisions of Section 208(a) of the Transportation Act, 1920.

Thereafter the defendant-in-error filed another complaint with the State Commission which was given the State Commission's *Docket No. 4738* in which complaint reparation was asked on shipments moving since March 1, 1920 (R. 16). A hearing was had on this complaint and the Commission announced its conclusion that the New York & Pennsylvania Company was entitled to reparation on shipments moving from March 1, 1920 to August 25,

1920, both inclusive, to the extent that the freight charges collected exceeded those which would have been collected on the basis of a rate of $1.00 and that on shipments moving subsequent to August 26, 1920, it was entitled to reparation to the extent that the rate collected exceeded a rate of $1.40. Two reparation orders were made by the Commission, one directing the payment of reparation pursuant to this decision with respect to shipments transported between March 1, 1920 and August 31, 1920, both inclusive, and the other relating to the shipments transported subsequent to the Guaranty Period (R. 20, 21). The second order was complied with.

This is an action *in assumpsit* to recover the amount of the reparation awarded by the first order.

The statement of claim in the Trial Court alleged that the freight charges collected on the coal transported during the Guaranty Period were unreasonable and in violation of the Public Service Company Law of Pennsylvania to the extent that they exceeded charges on the basis of the rates found by the State Commission to be reasonable, and set forth the proceedings before the State Commission and the decisions and orders of the Commission (R. 4-21).

The plaintiffs-in-error in their affidavits of defense set up the claim that the charges collected on the shipments in question were lawful under the Transportation Act, 1920, since they were based on the rate of $1.10 in effect on February 29, 1920, and since no reduction in that rate had been approved by the Interstate Commerce Commission; that therefore the reparation order of the State Commission was void and that no cause of action existed under the Public Service Company Law of the State (R. 22-36).

Upon the filing of these affidavits of defense the de-

fendant-in-error obtained from the Trial Court a rule to show cause why judgment should not be entered for the defendant-in-error for want of sufficient affidavits of defense. The reasons alleged in support of this motion were (1) that under the provisions of Article VI, Section 31, of the Public Service Company Law (P.L. 1429) the plaintiffs-in-error were precluded from setting up the defense relied upon because of their failure to appeal from the decision of the State Commission in *Docket No. 3206* in which no reparation order was made; (2) that the reparation order issued in *Docket No. 4738,* which was sued upon, was not a reduction of a rate requiring the approval of the Interstate Commerce Commission under Section 208(a) of the Transportation Act, 1920, and (3) that after the termination of Federal control on March 1, 1920, the transportation, being entirely within the State, was subject to the Pennsylvania Public Service Company Law only and the provisions of Section 208(a) of the Transportation Act, 1920, were not applicable thereto (R.36-38).

The Trial Court entered judgment for the defendant-in-error on the pleadings and on appeal to the highest Court of the State this judgment was affirmed—the highest Court of the State deciding that Section 208(a) of the Transportation Act, 1920, could have no application to this transportation, since it was entirely within the State of Pennsylvania, and that therefore the provisions of the Public Service Company Law were controlling (R. 94), and holding also that under the provisions of the Public Service Company Law the failure of the plaintiffs-in-error to appeal from the decision of the State Commission in *Docket No. 3206* precluded them from asserting their defense under the Transportation Act, 1920, in opposition to the suit to recover the amount of the reparation awarded by the State Commission in *Docket No. 4738* (R. 92, 96).

The case comes to this Court on writ of error from the Supreme Court of Pennsylvania.

Realizing that there might be some question whether the contentions relied upon by the plaintiffs-in-error drew in question the validity of the State law and the order of the State Commission thereunder or whether they constituted an assertion of a right under a federal statute, which right was denied by the State Court, the plaintiffs-in-error have likewise filed with this Court a petition for writ of certiorari to review the action of the State Court. Consideration of the petition for a writ of certiorari has been postponed until the hearing of the case on the merits on the writ of error.

The defendant-in-error has moved to dismiss the writ of error for reason hereafter discussed and on the same grounds opposes the issuance of the writ of certiorari.

Assignments of Error Intended to be Urged

It is the intention of the plaintiffs-in-error to urge upon argument in this Court the following errors assigned in their assignments of errors (R. 99, 100):

1. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below erred for the reason that by virtue of Section 208(a) of the Transportation Act, 1920, the plaintiff below was without a cause of action under the Public Service Company Law of Pennsylvania.

2. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below and in affirming the judgment of the Court of Common Pleas of Clinton County on plaintiff's motion for judgment for want of a sufficient affidavit of defense, erred for the reason that the defendants' affidavits of defense stated a complete defense to the plaintiff's cause of action; namely, that the freight charges collected on the shipments of the plaintiff below were in accordance with the rates in effect on February 29, 1920; that no reduction in those rates as applied to shipments transported between March 1 and September 1, 1920, had been approved by the Interstate Commerce Commission as required by Section 208 (a) of the Transportation Act, 1920, and that therefore the order for reparation issued by the Public Service Commssion of Pennsylvania upon which the suit was predicated was void and unenforceable and the plaintiff below had no cause of action under the Public Service Company Law of Pennsylvania.

3. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the court below erred for the reason that the freight rates collected by the plaintiffs-in-error

on the shipments made by the plaintiff below were lawful under Section 208 (a) of the Transportation Act, 1920, and were therefore not in violation of the Public Service Company Law of Pennsylvania and the plaintiff below had no cause of action under the provisions of that Act.

4. The Supreme Court of Pennsylvania, Eastern District, erred in holding that Section 208 (a) of the Transportation Act, 1920, was not a restriction upon the power of the Public Service Commission of Pennsylvania to order a reduction in rates on shipments moving between March 1, 1920, and September 1, 1920.

5. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the order for reparation issued by the Public Service Commission upon which plaintiff's cause of action below was predicated was not a reduction in the rates on shipments moving between March 1, 1920, and September 1, 1920, and void by reason of the provisions of Section 208 (a) of the Transportation Act, 1920.

6. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the plaintiffs-in-error were precluded from setting up the defense relied upon by them because of their failure to appeal from the decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206."

Outline of Argument

I. THE WRIT OF ERROR SHOULD NOT BE DISMISSED.

A. The affidavits of defense challenged the validity of a law or an authority under the State of Pennsylvania on the ground of their repugnance to Section 208(a) of the Transportation Act, 1920, and the decision of the State Court was in favor of their validity.

1. The reparation order of the Public Service Commission was a statute of or an authority exercised under a State within the meaning of Section 237 of the Judicial Code.

Ohio Valley Co. v. *Ben Avon Borough*, 253 U. S. 287;
Pennsylvania R. R. Co. v. *Public Service Comm.*, 250 U. S. 566;
Lake Erie & W. R. R. Co. v. *Public Utility Comm.*, 249 U. S. 422;
Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134.

2. The validity of the reparation order of the Public Service Commission in *Docket No. 4738* was drawn in question on the ground of its repugnance to Section 208 (a) of the Transportation Act, 1920.

3. The validity of the Public Service Company Law of Pennsylvania was drawn in question on the ground that it was in conflict with Section 208 (a) of the Transportation Act, 1920.

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282;
Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135.

B. The fact that the State Court decided that

under the Public Service Company Law of Pennsylvania the defendant-in-error was entitled to recover because of the failure of the plaintiffs-in-error to appeal from the decision of the State Commission in *Docket No. 3206* does not warrant the dismissal of the writ of error.

1. This is not a decision on an independent State ground sufficient to sustain the judgment since the federal issue goes to the entire case.

West Chicago R. R. Co. v. *Chicago,* 210 U. S. 506, 519;
Corn Products Refining Co. v. *Eddy,* 294 U. S. 427, 432;
Harding v. *Illinois,* 196 U. S. 78;
Chicago, B. & Q. R. R. v. *Drainage Commrs.,* 200 U. S. 561, 560.

2. The State Court expressly decided the federal question and it cannot be said that its judgment was not based upon this decision.

North Carolina R. R. Co. v. *Zachary,* 232 U. S. 348.

3. The circumstances of this case are such that this Court should itself review the record to ascertain whether the federal question sought to be raised by their affidavits of defense was waived by the failure of the plaintiffs-in-error to appeal from the decision of the Public Service Commission of Pennsylvania in *Docket No. 3206* and should hold that such failure to appeal did not constitute a waiver of the defense under the federal statute, and that the State Court's decision to the contrary was so clearly erroneous as not to be conclusive upon this Court.

(a) Whether or not the federal issue has been waived is itself a federal question as to which this Court is not bound by the decision of

the State Court, but should itself review the record to ascertain whether such was the fact. And even if the State Court's decision purports to be based in part on an independent state ground this Court is not concluded thereby if such decision was based upon a mistaken understanding of the facts or of the federal issues sought to be raised, or was so clearly erroneous as to be arbitrary.

Carter v. *Texas*, 177 U. S. 442, 447;
Mitchell v. *Clark*, 110 U. S. 635, 645;
Union Pacific R. R. Co. v. *Public Service Comm.*, 248 U. S. 67;
Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157;
First National Bank v. *Anderson* (decided Jan. 4, 1926), 46 S. Ct. 135.

(b) The defense under Section 208 (a) of the Transportation Act, 1920, was asserted at the earliest possible moment in this suit.

Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291.

(c) The decision of the State Court was based upon an erroneous understanding of the facts and the issues in that the State Court considered that the issues raised related to the State Commission's decision and order fixing a rate of $1.40 and not, as was the fact, to the reparation order requiring a reduction in the rate of $1.10 charged during the Guaranty Period.

(d) The failure to appeal from the decision of the State Commission in *Docket No. 3206* could constitute a waiver of the defense relied upon only if the issues raised by this defense were there decided by the Commission and subject to review. The decision of the State Court was therefore erroneous since it was based upon

the erroneous impression of the facts that the issues raised by the affidavits of defense were submitted to and decided by the State Commission in *Docket No. 3206* when such was not, and in the nature of things could not have been, the fact.

(e) The failure to appeal from the decision of the State Commission in *Docket No. 3206* could constitute a waiver of the defense relied upon only if such an appeal could have presented the issues raised by the defense for adjudication. The State Court's decision that the defense had been waived was clearly erroneous since such an appeal would have been premature and could not properly have presented the issues for adjudication.

(f) The action of the plaintiffs-in-error in not appealing from the State Commission's decision in *Docket No. 3206* was in accordance with the provisions of the Public Service Company Law as interpreted by the State Courts in previous decisions with which the decision in the case at bar is so plainly in conflict as to be arbitrary.

Newport & S. V. R. R. Co. v. *Public Service Comm.*, 75 Pa. Superior Ct. 28;

New York & Pennsylvania Co. v. *N. Y. C. R. R. Co.*, 267 Pa. 64;

Lehigh & New England R. R. Co. v. *Public Service Comm.*, 79 Pa. Superior Ct. 540, 277 Pa. 493.

(g) The cases cited by defendant-in-error in support of its motion to dismiss do not require dismissal of the writ of error on the facts in this case.

Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157;

Minnesota, etc. Ry. v. *Washburn Co.*, 254 U. S. 370;
Nickel v. *Cole*, 256 U. S. 222;
Howat v. *Kansas*, 258 U. S. 181;
Central Union Telephone Co. v. *City of Edwardsville* (decided Nov. 23, 1925), 70 L. ed. (Adv. 113).

II. EVEN IF THE WRIT OF ERROR WAS IMPROPERLY SOUGHT THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI IN ORDER TO REVIEW THE DECISION OF THE COURT BELOW.

III. BY REASON OF SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, THE FACT THAT THE CHARGES COLLECTED ON SHIPMENTS MOVING BETWEEN MARCH 1 AND SEPTEMBER 1, 1920, WERE COMPUTED ON THE BASIS OF THE RATE IN EFFECT ON FEBRUARY 29, 1920, AND THE FURTHER FACT THAT NO REDUCTION IN THAT RATE FOR THE PERIOD PRIOR TO SEPTEMBER 1, 1920, HAD OR HAS BEEN APPROVED BY THE INTERSTATE COMMERCE COMMISSION CONSTITUTE A COMPLETE DEFENSE TO THE SUIT OF THE DEFENDANT-IN-ERROR UNDER ARTICLE V, SECTION 5, OF THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA TO ENFORCE THE REPARATION ORDER MADE BY THE STATE COMMISSION RELATING TO SUCH SHIPMENTS.

A. Section 208 (a) of the Transportation Act, 1920, was intended to and by its terms did apply to intrastate transportation.

Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135.

B. Section 208 (a) of the Transportation Act, 1920, is not unconstitutional as applied to intrastate rates.

Commercial Trust Co. v. *Miller*, 262 U. S. 51, 57;
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146;
Jacob Ruppert v. *Caffey*, 251 U. S. 264;
Dryfoos v. *Edwards*, 284 Fed. 596;
Public Service Comm. v. *New York Central R. R. Co.*, 230 N. Y. 149, 153;
Michigan Central R. R. Co. v. *Michigan Public Utilities Comm.*, 271 Fed. 319.

C. The prohibition of Section 208 (a) of the Transportation Act, 1920, of a reduction of rates during the Guaranty Period without the approval of the Interstate Commerce Commission renders unenforcible under the State law a reperation order of a State Commission awarding reparation on intrastate shipments in the amount of the difference between the rate in effect on February 29, 1920, and a lower rate unless reduction approved by the Interstate Commerce Commission.

Southern Pacific Co. v. *Railroad Comm.*, 194 Cal. 734, 231 Pac. 28.

D. The rates charged on the shipments involved in the case were lawful under Section 208 (a) of the Transportation Act. 1920. Therefore they were not unlawful under the State Public Service Company Law and no suit for damages for a violation of that statute can be maintained.

ARGUMENT

I

THE WRIT OF ERROR SHOULD NOT BE DISMISSED

Dismissal of the Writ of Error is sought upon two grounds. First, while it is agreed by the defendant-in-error that the Supreme Court of Pennsylvania made a decision with respect to the issues under Section 208 (a) of the Transportation Act, 1920, raised by the affidavits of defense, it is claimed that this was not a decision in favor of the validity of a State law or an authority exercised under a State whose validity had been drawn in question on the ground of its repugnance to a federal statute. Second, it is claimed that no review may be had in this Court because although the Court below decided the federal issue it also made a decision on an independent State ground broad enough to support its conclusion, in that it decided that the defense asserted under the federal statute had been waived by the failure of the plaintiffs-in-error to appeal to the courts from the decision of the State Commission in *Docket No. 3206.*

These two grounds will be considered in order.

A. THE AFFIDAVITS OF DEFENSE CHALLENGED THE VALIDITY OF A LAW OF OR AN AUTHORITY UNDER THE STATE OF PENNSYLVANIA ON THE GROUND OF THEIR REPUGNANCE TO SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, AND THE DECISION OF THE STATE COURT WAS IN FAVOR OF THEIR VALIDITY.

This suit was brought solely under Article V, Section 5, of the Public Service Company Law of Pennsylvania, the pertinent portion of which is as follows:

"If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be *prima facie* evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received."

The reparation order of the State Commission in *Docket No. 4738* was offered by the defendant-in-error as the basis of its suit and as *prima facie* evidence to sustain the allegation of the complaint that the charges collected were unlawful under the Public Service Company Law.

If the reparation order is the basis of a cause of action or is *prima facie* evidence of the unlawfulness of the charges collected and of the right of the defendant-in-error to recover it is only because of the provisions of the Public Service Company Law of Pennsylvania. The right of the defendant-in-error to recover depends, therefore, entirely upon the validity of the reparation order and also upon the validity of the Public Service Company Law making the reparation order *prima facie* evidence and giving to the defendant-in-error a cause of action for its enforcement.

If the reparation order of the State Commission was a statute of or an authority exercised under the State within the meaning of Section 237 of the Judicial Code and its validity was drawn in question on the ground of its being repugnant to Section 208 (a) of the Transportation Act,

1920, or if the validity of the Public Service Company Law was drawn in question on the same ground, then a perfect case for review on writ of error under Section 237 of the Judicial Code is here presented; for the State Court, having held that the defendant-in-error is entitled to recover, has thereby rendered a decision in favor of the validity of the order and of the State statute.

1. THE REPARATION ORDER OF THE PUBLIC SERVICE COMMISSION WAS A STATUTE OF OR AN AUTHORITY EXERCISED UNDER A STATE WITHIN THE MEANING OF SECTION 237 OF THE JUDICIAL CODE.

That an order of a State administrative tribunal is a statute of or an authority exercised under a State within the meaning of Section 237 of the Judicial Code is apparent from the cases in which this Court has held that a decision of a State Court sustaining such an order as valid may be reviewed here on writ of error.

Ohio Valley Co. v. *Ben Avon Borough*, 253, U. S. 287;

Pennsylvania R. R. Co. v. *Public Service Comm.*, 250 U. S. 566;

Lake Erie & W. R. R. Co. v. *Public Utility Comm.*, 249 U. S. 422;

Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134.

The state commissions' orders in these cases were, it is true, orders directing some future action or prescribing rates for the future but we believe that it can not successfully be urged that a different conclusion is required in the case at bar merely because the order of the State Commission here sued upon was a reparation order rather than an order prescribing rates to be thereafter charged.

Whatever may be the character of a reparation order in other circumstances we submit that when the situation here presented is considered and the purposes of the Transportation Act, 1920, are borne in mind it must be held that a decision as to the validity of this reparation order may as properly be reviewed on writ of error as a decision with respect to the validity of an order fixing rates for the future.

In the second portion of this brief in discussing the merits of the case we have dealt at some length with the character of the reparation order here under consideration (see pp. 77-84), and reference is made to what is there said in support of the present point.

The complaint to the Public Service Commission in *Docket No. 3206* was filed in February, 1920. Had the decision on that complaint been announced at once and had the State Commission in March, 1920, found that the rate of $1.10 was unreasonable and that the rate to be thereafter charged should be only $1.00 and had it at that time made an order requiring the plaintiffs-in-error immediately to establish the rate of $1.00 it cannot be doubted on the authority of the cases just cited that a decision of the State Court sustaining this order as valid would be reviewable here on writ of error.

As a matter of fact, however, the State Commission did not decide *Docket No. 3206* until August, 1921, and therefore could not deal with the rates for the period from March 1 to September 1, 1920, by an order prescribing rates for the future. In the reparation proceedings, *Docket No. 4738*, it attempted to do the only thing which it could do to accomplish the same result, namely, award reparation to the basis of the $1.00 rate. In other words, the State Commission's order in *Docket No. 4738* here sued

upon is an order seeking to put the parties in the position which they would have been in had the Commission disposed of the case in time to fix the rates for the Guaranty Period by an order for the future. It follows, as we have argued hereafter, that the reparation order is in substance an order reducing rates and we therefore submit that the decision of the State Court sustaining its validity, if its validity was drawn in question, is reviewable here on writ of error as would be an order prescribing rates for the future.

2. THE VALIDITY OF THE REPARATION ORDER OF THE PUBLIC SERVICE COMMISSION IN *DOCKET NO. 4738* WAS DRAWN IN QUESTION ON THE GROUND OF ITS REPUGNANCE TO SECTION 208(a) OF THE TRANSPORTATION ACT, 1920.

In their affidavits of defense to the statement of claim of the plaintiff below, the defendant-in-error here, the plaintiffs-in-error denied the validity of the order of the Public Service Commission of June 20, 1922, in *Docket No. 4738* upon which this suit is based (R. 25, 26, 36). This contention proceeded upon the grounds (1) that the rate charged was a lawful rate under the provisions of Section 208(a) of the Transportation Act, 1920, and therefore was not unlawful in violation of the Public Service Company Law; (2) that therefore the order of the Public Service Commission based upon the theory that the rate was unlawful in violation of the Public Service Company Law was void, and (3) that the order would accomplish a reduction in the rates for the Guaranty Period below the level of the rates in effect at the termination of Federal control, without the approval of the Interstate Commerce Commission as required by Section 208(a) of the Transportation Act, 1920, (R. 22-36).

3. THE VALIDITY OF THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA WAS DRAWN IN QUESTION ON THE GROUND THAT IT WAS IN CONFLICT WITH SECTION 208(a) OF THE TRANSPORTATION ACT, 1920.

The plaintiffs-in-error have asserted that so far as the shipments involved in this suit were concerned, the Public Service Company Law was superseded by the Transportation Act, 1920; that the rates charged were lawful under that Act; that therefore the defendant-in-error was without a cause of action under the Public Service Company Law to enforce the order of the State Commission, and that in so far as the State Law might be claimed to render the rates collected unlawful and to make the reparation order in *Docket No. 4738 prima facie* evidence and give a cause of action, it was superseded by the Transportation Act, 1920, and was therefore inoperative and invalid.

It is not necessary that the validity of the State statute in its entirety be attacked. It is sufficient to support a writ of error if the validity is challenged in so far as it is claimed to be applicable to this case, *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282.

In *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, this Court, on writ of error, reviewed and reversed a decision of a state court sustaining the allowance of a writ of mandamus requiring a railroad to charge no higher rates than those fixed by State law. The writ of error was sought on the ground that the State law had been superseded by the order of the Director General of Railroads prescribing intrastate rates pursuant to authority conferred by the Federal Control Act (Act of Congress, March 21, 1918, 40 Stat. L. 451) and the rates charged were those established under that order. In the case at bar the rates charged were likewise established under the same order of the Director General pursuant to the Federal Control

Act. The Transportation Act, 1920, whose provisions are relied upon, was an act relating to the return of the railroads to their owners, as the Federal Control Act provided for their taking over by the Government. The situation presented in the case at bar is in all respects similar to that considered in the *North Dakota Case, supra,* and it is submitted that if a writ of error was proper there it is equally so here.

B. THE FACT THAT THE STATE COURT DECIDED THAT UNDER THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA THE DEFENDANT-IN-ERROR WAS ENTITLED TO RECOVER BECAUSE OF THE FAILURE OF THE PLAINTIFFS-IN-ERROR TO APPEAL FROM THE DECISION OF THE STATE COMMISSION IN *DOCKET NO. 3206* DOES NOT WARRANT THE DISMISSAL OF THE WRIT OF ERROR.

This suit was originally contested by the carriers not only because of their belief that there was here no enforcible cause of action, but also in order to obtain an adjudication of the question of the power of the State authorities to enforce retroactive reductions of intrastate rates collected on shipments moving during the Guaranty Period which would afford a precedent for the disposition of numerous claims of this character pending in the various States, proceedings in which have been held in suspense pending a final decision by this Court in the present case. It would be regrettable, therefore, if a decision of the principal issue by this Court in the present case should be prevented by the dismissal of the writ of error or a denial of the writ of certiorari for the reasons which have been urged therefor by the defendant-in-error. We believe, however, that these reasons are unsound and that a dismissal of the writ of error or denial of the writ of certiorari is not warranted and that this Court should render a decision upon the principal issue.

In order to understand the theory upon which the dismissal of the writ of error is sought a brief reference to the history of the proceedings leading up to the present suit is necessary.

The rate of $1.10 was in effect on February 29, 1920, and continued to be charged thereafter. The complaint in *Docket No. 3206* alleging that this rate would be unlawful in violation of the Public Service Company Law after March 1, 1920, was filed shortly prior to that date and hearing on this complaint was had early in March of 1920. The railroads then contended that the evidence failed to show that the rate was unjust or unreasonable. They did not deny the jurisdiction of the State Commission to consider the reasonableness of this rate for the period after March 1, 1920, including the Guaranty Period. On the contrary they expressly admitted that the State Commission had authority to enter upon the inquiry and render a *decision* as to the reasonableness of the rates. But they did contend that in view of the Section 208(a) of the Transportation Act, 1920, no *order* of the State Commission requiring a reduction from the rate of $1.10 could be enforced prior to September 1, 1920, without the Interstate Commerce Commission's approval.

Prior to September 1, 1920, neither a decision nor an order was made by the State Commission. Its decision was not announced until nearly a year later. In August, 1921, came its decision that the rate of $1.10 had been unreasonable during the Guaranty Period and that the rate of $1.54 which had been made effective before its decision was announced would be unreasoanble for the future to the extent that it exceeded $1.40.

We submit that there is a very sound distinction between a *decision* or a determination that a rate is unreasonable and an *order* requiring a certain rate to be made

effective. The latter enforces a reduction, the former does not. This distinction the State Court seems not to have recognized and this may in part explain its decision. The distinction is not merely one of words but finds proof in the fact that there is no provision of the Public Service Company Law of Pennsylvania which renders a public utility guilty of a violation of the statute and subjects it to penalties for continuing to collect a rate merely because a decision has been announced that the rate is unreasonable. The utility is subject to penalty only if it fails to comply with an *order* requiring it to establish a certain rate or to do some other specific act, and is not subject to penalty if it collects the rates contained in its tariffs, even if these are held to be unreasonable by the State Commission (Public Service Company Law, Art. VI, Section 41, P. L. 1432). The distinction, we believe, is similar to that between a decision of a Court of Equity and a decree issued pursuant thereto. Until the decree has been made no proceedings for contempt for a violation merely of the decision can be brought.

When it announced its decision in *Docket No. 3206* the only order which the State Commission made was an order fixing rates to be charged after August, 1921 (R. 12-15). It made no requirement as to what the carriers should do with respect to the charges which had been collected during the Guaranty Period. In fact, it definitely stated that no order as to these charges would be made until a later proceeding. It is obvious that since the charges had already been collected the only order which could have given effect to the Commission's determination as to the reasonableness of the rates during the Guaranty Period would have been a reparation order. No reparation order was made until the subsequent proceeding in *Docket No. 4738* (R. 19).

The portion of the Public Service Company Law which,

according to the Court below, gave the defendant-in-error a cause of action because of the failure of the plaintiffs-in-error to appeal from the State Commission's decision in *Docket No. 3206* is found in Article VI, Section 31, of the Public Service Company Law (P. L. 1429) which is in part as follows:

> "Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

The provisions for "an appeal or proceeding taken as provided in this act" are found in Article VI, Section 17, as amended June 3, 1915 (P. L. 779), the pertinent portion of which reads:

> "Section 17. Within thirty days after filing of any finding or determination by the Commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court; Provided, that *there shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided.*" (Italics ours.)

The reference contained in the proviso just quoted to a suit on an order for reparation is to Article V, Section 5 (P. L. 1405) which provides:

> "If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named

> therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be *prima facie* evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received."

It must be borne in mind that the plaintiffs-in-error made no objection to the orders of the State Commission prescribing rates to be charged after August, 1921, but promptly complied therewith. They did not therefore seek to review the action of the State Commission in *Docket No. 3206* as to such rates. This the lower Court appears not to have understood, as we will later more fully point out.

Under these circumstances the carriers believed that a mere decision that the rates charged during the Guaranty Period had been unreasonable, unaccompanied by any *order* seeking to give effect thereto, did not affect the rights of the parties and that a sufficient opportunity to contest a reparation award would be afforded if and when an order for the payment of reparation might be made. They considered the provisions of the State law above quoted as theretofore construed by the State Courts, to mean that the proper method of testing a reparation order was by defense to a suit for its enforcement. Hence the carriers took no appeal from the action of the State Commission in *Docket No. 3206*.

Thereafter the defendant-in-error filed its complaint in *Docket No. 4738* seeking reparation and after a hearing the reparation order was issued. Payment of the reparation order was refused by the railroads in order that the ques-

tion of the enforcibility of the order might be adjudicated. Thereupon this suit was brought.

The very fact that defendant-in-error was compelled to file a new complaint in *Docket No. 4738* in order to recover reparation and that the Public Service Commission did not award reparation or make a finding with reference thereto until after further hearings on this new complaint shows that in *Docket No. 3206* the Commission did nothing final or effective; nothing, in short, which could be made the basis of an appeal.

On these facts, we submit that no ground for dismissing the writ of error exists merely because it is claimed that the State Court has held that under the Public Service Company Law the defendant-in-error is entitled to recover on account of the failure of the railroads to appeal from the Commission's decision in *Docket No. 3206.*

1. THIS IS NOT A DECISION ON AN INDEPENDENT STATE GROUND SUFFICIENT TO SUSTAIN THE JUDGMENT SINCE THE FEDERAL ISSUE GOES TO THE ENTIRE CASE.

This Court has held that although a State Court purports to rest its judgment upon an independent matter of State law its decision may be reviewed here on writ of error, provided the federal question which is raised goes to the entire case. In *West Chicago R. R.* v. *Chicago,* 201 U. S. 506, Mr. Justice Harlan in delivering the opinion of this Court, said at pages 519, 520:

> "1. The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation—although the opinion of the state

> court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting the State from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for, the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them."

It has been held that this is so even where the State Court fails to discuss the federal question at all. *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, 432. *Harding* v. *Illinois*, 196 U. S. 78. In *Chicago, B. & Q. R. R.* v. *Drainage Commrs.*, 200 U. S. 561, 580, this Court again speaking through Mr. Justice Harlan said:

> "Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however, the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But *it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.*" (Italics ours.)

It is submitted that in the case at bar the federal issue goes to the entire case and that even the State Court's conclusion that the defendant-in-error is entitled to recover because of the failure of the carriers to appeal from the State Commission's decision in *Docket No. 3206* was a determination of this federal issue.

Assuming for the sake of argument that the State Court correctly understood the facts and the issues of the case (which we claim it did not) to which it purported to apply the provisions of the State Law, and that the issues raised by the affidavits of defense were, as the State Court seems to have believed, submitted to and decided by the State Commission in *Docket No. 3206,* we submit that nevertheless, the State Court could not escape a determination of the federal question.

The plaintiffs-in-error by their affidavits of defense asserted that no reduction therein having been approved by the Interstate Commerce Commission the rates in question were lawful under Section 208(a) of the Transportation Act, 1920; that since they were the rates which the railroads were required by this federal statute to collect the charging of these rates could not constitute a violation of the Public Service Company Law; that the provisions of that law were therefore inapplicable to the situation and invalid; that the reparation order of the State Commission in *Docket No. 4738* was null and void, and that a State statute which would make such an order *prima facie* evidence of the facts stated must be likewise invalid.

Under these circumstances since the only ground for the State Court's decision with respect to the failure to appeal in *Docket No. 3206* is to be found in the provisions of the State Public Service Company Law itself, and not

in some general procedural statute, its determination that the defendant-in-error was entitled to recover thereunder necessarily involved a determination that the provisions of the State Public Service Company Law were controlling regardless of the federal statute and therefore was a determination of the federal issue.

2. THE STATE COURT EXPRESSLY DECIDED THE FEDERAL QUESTION AND IT CAN NOT BE SAID THAT ITS JUDGMENT WAS NOT BASED UPON THIS DECISION.

In *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 348, it was urged in support of a motion to dismiss the writ of error that the federal question sought to be raised, a question under the Federal Employer's Liability Act, had not been properly raised in the Trial Court in accordance with the local procedural statute. The State Court, however, had passed upon the question and this Court therefore held that the writ of error should not be dismissed but that it would itself review the State Court's decision on the federal question.

In the case at bar the State Court discussed at length and rendered a decision on the federal question sought to be raised by the affidavits of defense. This is agreed by defendant-in-error. The following portions of the Court's opinion clearly indicate this fact (R. 93):

> "In 1922, the Public Service Commission was asked to grant reparation to the appellees for the sums paid in excess of the dollar rate for the period from March 1, 1920 to August 26 of the same year, and $1.40 thereafter, and to award a sum which would equal the overcharges, and this resulted in an allowance to the petitioners. The sum claimed for the excess collection, during the so-called guarantee period mentioned, forms the foundation of the pres-

ent suit. A statement of claim was filed, and an affidavit of defense interposed, which the learned Court below held to be insufficient, with the result that judgment was entered for the plaintiff.

As noted, the defense rests on the proposition that the rate fixed as reasonable by the Public Service Commission of the State is ineffective, in that no approval of the Interstate Commission was secured to reduce rates during the guaranty period, and it is insisted such action was required under the terms of the Transportation Act. This overlooks the provision of the Congressional legislation that no changes shall be made unless approved 'by *State* or Federal authority.' It is clear that the local rates were held in abeyance during the period of federal control, and, as far as interstate commerce is concerned, remained subject to the action of the Interstate Commerce Commission until September 1, 1920, but after March 1st of that year, insofar as intrastate rates were concerned, the control of the State Commission again became effective: *L. & N. E. R. R. Co.* v. *Pub. Ser. Comm.*, 277 Pa. 493; see, *L. & N. E. R. R. Co.* v. *Pub. Serv. Comm.*, 79 Pa. Superior Ct. 540. As said by Judge Kephart in the decision first cited: 'After the Act of 1920 the control of the Interstate Commerce Commission was (1) to establish a level of rates which would afford the compensation necessary to permit the maintenance of an adequate national railway system during the prescribed period; (2) remove discrimination against interstate commerce as a whole arising from the enforcement by State authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic aimed at persons or localities by any intrastate rate or schedule.'

Prior to the Transportation Act and the taking over of the railroads by the Government, it is clear the Interstate Commerce Commission had no control over matters affecting intrastate transportation, including the rates charged by such carriers, except

as their enforcement caused discrimination against interstate commerce: *R. R. Com. of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *U. S.*, 257 U. S. 591; *Texas* v. *Eastern Texas R. R.*, 258 U. S. 204. Here, admittedly, the shipments are of the former class alone, and do not affect the movement of freight from one state to another. During the war, the Federal Government controlled both classes, but beginning with March 1, 1920, the Federal rights were limited, and, as already noted, the determination of reasonableness of charges was either within the jurisdiction of the 'State or Federal authority,' depending on the character of the traffic, and other effective limitations of the Transportation Act'' (281 Pa. 267).

The State Court having decided the federal question, whatever other conclusions it may have expressed, we submit that its decision is properly reviewable here. This is the more so when the State Court's report is read in full, for such a reading will disclose how impossible it is to determine the exact grounds upon which the State Court's judgment was based.

3. THE CIRCUMSTANCES OF THIS CASE ARE SUCH THAT THIS COURT SHOULD ITSELF REVIEW THE RECORD TO ASCERTAIN WHETHER THE FEDERAL QUESTION SOUGHT TO BE RAISED BY THEIR AFFIDAVITS OF DEFENSE WAS WAIVED BY THE FAILURE OF THE PLAINTIFFS-IN-ERROR TO APPEAL FROM THE DECISION OF THE PUBLIC SERVICE COMMISSION OF PENNSYLVANIA IN *DOCKET NO. 3206* AND SHOULD HOLD THAT SUCH FAILURE TO APPEAL DID NOT CONSTITUTE A WAIVER OF THE DEFENSE UNDER THE FEDERAL STATUTE AND THAT THE STATE COURT'S DECISION TO THE CONTRARY WAS SO CLEARLY ERRONEOUS AS NOT TO BE CONCLUSIVE UPON THIS COURT.

(a) Whether or not the federal issue has been waived is itself a federal question as to which this Court is not bound by the decision of the State Court, but should itself review the record to ascertain whether such was the fact. And even if the State Court's decision purports to be based in part on an independent state ground this Court is not concluded thereby if such decision was based upon a mistaken understanding of the facts or of the federal issues sought to be raised, or was so clearly erroneous as to be arbitrary.

In *Carter* v. *Texas*, 177 U. S. 442, at page 447, this Court said:

> "But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State. *Neal* v. *Delaware*, 103 U. S. 370, 396, 397; *Mitchell* v. *Clark*, 110 U. S. 633, 645; *Boyd* v. *Thayer*, 143 U. S. 135, 180."

In the present case the Court below gave judgment for the defendant-in-error on the ground that the affidavits of defense were insufficient. In *Mitchell* v. *Clark*, 110 U. S. 633, at page 645, Mr. Justice Miller said:

> "3. The question whether a plea sets up a sufficient defence, when the defence relied on arises under an act of Congress, does present, and that necessarily, a question of federal law; for the ques-

> tion is and must be, does the plea state facts which under the act of Congress constitute a good defence?"

The State Court held that the defense under a federal statute had been waived by the conduct of the plaintiffs-in-error. This Court has held that when a State Court has decided that a party was estopped to assert a defense relied upon under the Federal Constitution or under a federal statute it will itself review the record to ascertain the correctness of the decision. *Union Pacific R. R. Co.* v. *Public Service Comm.*, 248 U. S. 67. In that case Mr. Justice Holmes, delivering the opinion of the Court at page 69 thereof, said:

> "The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. *Creswill* v. *Knights of Pythias*, 225 U. S. 246."

In *Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, Mr. Justice Van Devanter, speaking for the Court, said (p. 164):

> "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See *Moran* v. *Horsky*, 178 U. S.

205, 208; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe* v. *Thomas,* 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend, Ibid.,* 359, 367."

Of special interest in connection with the case at bar is the recent decision of this Court in the case of *First National Bank* v. *Anderson,* decided January 4, 1926, 46 S. Ct. 135. That case was a suit to restrain the collection of State taxes on the ground that the tax law discriminated between bank stock and moneyed capital invested in competition therewith in violation of the federal statute. The State Court having sustained the tax the case came before this Court on writ of error. In the course of the opinion of the Court Mr. Justice Van Devanter said:

"By a motion to dismiss the jurisdiction of this Court on the writ of error is challenged on the grounds, first, that the State Court rested its judgment on the construction and sufficiency of the allegation of the petition and its decision of that question is conclusive here; and, secondly, that the judgment is right independently of any ruling on the asserted federal question, in that the suit is not one in which relief may be had in equity because (a) an adequate remedy at law may be had under the local law by paying the tax and suing to recover the money, (b) *the bank has not exercised the local statutory right of appealing from the action of the county officers imposing the tax,* and (c) there has been no payment or tender of so much of the taxes as would be due if the five mills levy were applied to the shares.

Plainly the first ground cannot be maintained. Whether a pleading sets up a sufficient right of ac-

> tion or defense grounded on the Constitution or a law of the United States is necessarily a question of federal law, and, where a case coming from a State Court presents that question, this Court must determine for itself the sufficiency of the allegation displaying the right or defense and is not concluded by the view taken of them by the State Court (citing cases).
>
> The second ground is not better."

Finally, in no case that we have been able to find has this Court held itself concluded by a decision of a State Court, even on a supposedly independent state ground, where it appeared that the State Court misunderstood the facts in the case and the nature of the federal issues raised and where its decision on the state ground was the result of such misunderstanding.

(b) The defense under Section 208(a) of the Transportation Act, 1920, was asserted at the earliest possible moment in this suit.

It has been held by this Court that the proper manner and time to raise a federal issue is upon the pleadings in the Trial Court. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291. The plaintiffs-in-error asserted their contentions in their affidavits of defense to the statement of claim in the Trial Court in the present suit. Under the Public Service Company Law of Pennsylvania this was the first opportunity which existed for the plaintiffs-in-error to object to the decision and reparation order in *Docket No. 4738,* the Public Service Company Law expressly prohibiting an appeal directly from an order or a decision of the State Commission with respect to reparation and providing for objection thereto only in a suit brought for its enforcement.

It was not said by the Pennsylvania Court that the defense was asserted too tardily in the present suit, but that the defense had been waived because no appeal had been taken from a decision of the Public Service Commission in a different and earlier case than that in which the order here in suit was made. We know of no decisions of this Court which have gone so far as to hold that a defense under a federal statute has been waived under these circumstances.

(c) The decision of the State Court was based upon an erroneous understanding of the facts and the issues in that the State Court considered that the issues raised related to the State Commission's decision and order fixing a rate of $1.40 and not, as was the fact, to the reparation order requiring a reduction in the rate of $1.10 charged during the Guaranty Period.

Three times the plaintiffs-in-error sought a reargument before the Court below, not alone to urge their legal contentions relied upon, but also to point out errors in the Court's understanding of the facts. In spite of these efforts the decision reflects several serious errors as to facts which appear material to the decision.

The language of the State Court's opinion indicates that the issue which it understood to be involved in this case related to the order of the State Commission in *Docket No. 3206* fixing the rate of $1.40 to be charged after August, 1921. Thus it said (R. 91):

> "From the *order* fixing the reasonable rate no such appeal was taken, and the appellants are now debarred from complaining of the ruling" (281 Pa. 264). (Italics ours.)

As has already been pointed out, the only *order* made in *Docket No. 3206* was the order fixing the rate of $1.40 to be charged after August, 1921.

That the Court had this order in mind is indicated by the following further language of the opinion; quoting from the report of the Commission in *Docket No. 3206* relating to the $1.40 rate:

> "'* * * Respondents will be directed, by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of *$1.40,' being the rate here complained of.* This order was made without any qualification and, as indicated, without any suggestions of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal" (R. 93) (281 Pa. 267). (Italics ours.)

Of course, the rate of $1.40 is not the rate complained of here nor is it the rate which was charged during the Guaranty Period. It is the rate prescribed by the State Commission to be charged after August, 1921. Admittedly the order prescribing this rate was made without qualification, was final and was the subject of appeal, but the railroads did not object to the order and did not seek an appeal to obtain adjudication of the power of the State Commission to enforce it.

Therefore, we submit that a decision of the State Court that the failure of the plaintiffs-in-error to appeal from the decision and order of the State Commission was a waiver of the defense asserted in this suit, is not to be accepted as final by this Court when it appears that the Court's decision was made on the theory that the defense sought to put in issue the legality of the order fixing the rate of $1.40 when such is far from the fact and when this case involves only the rate of $1.10 as to which the Commission made no order in *Docket No. 3206.*

(d) The failure to appeal from the decision of the State Commission in Docket No. 3206 could constitute a waiver of the defense relied upon only if the issues raised by this defense were there decided by the Commission and subject to review. The decision of the State Court was therefore erroneous since it was based upon the erroneous impression of the facts that the issues raised by the affidavits of defense were submitted to and decided by the State Commission in Docket No. 3206 when such was not, and in the nature of things could not have been the fact.

It is self-evident that unless an adjudication of the federal issues could have been had on an appeal from the decision in *Docket No. 3206* the failure to take such an appeal could not constitute a waiver of a claim to have the question adjudicated in a later proceeding and therefore could not be a waiver of the defense relied upon which seeks this result. It is equally obvious that unless these issues had been submitted to and decided by the State Commission in *Docket No. 3206,* an appeal to review the Commission's decision in that case would not have presented the issues for adjudication.

This indeed seems to have been the view of the Court below and its conclusion, judging from its opinion, seems to rest upon its impression that the issues raised by the affidavits of defense were submitted to and decided by the Commission in *Docket No. 3206* and were of such a character that they could have been properly adjudicated upon appeal from this decision. This is indicated by the following language from the Court's opinion:

> "Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, a different proposition might be before us. But that the contrary was considered and decided in Complaint No. 3206, and squarely passed upon by the Commission, is evidence not only from the record in that proceeding,

but from the opinion in the reparation proceedings now before the Court. It was only after our decision in *L. & N. E. R. R. Co.* v. *Pub. Ser. Com.*, 277 Pa. 493, that a change of attitude by the defendants took place" (R. 92) (281 Pa. 265).

With all due respect for the Court below, we submit that its view of the facts was entirely erroneous and that its statement as to the attitude of the carriers was wholly unwarranted. However, the circumstance that the Court below predicated its decision upon this view of the facts indicates clearly that the question whether the plaintiffs-in-error waived their defense depends largely upon the facts as to the character of the defense and the issues submitted to the Commission in *Docket No. 3206* rather than upon an interpretation of the provisions of the Public Service Company Law. Certainly this Court is not bound by the view of the facts adopted by the Court below but will itself review the record to see whether the Court below correctly understood the facts of record which it held to indicate a waiver of the defense now asserted.

The substance of the defense here asserted under the federal statute is that the rates collected were lawful because no *reduction* therein had been approved by the Interstate Commerce Commission. Whether this federal issue was submitted to and decided by the State Commission depends at least in part upon what was meant by the words "no rate shall be *reduced*" as used in Section 208(a) of the Transportation Act, 1920.

We submit that a rate is not *reduced* by a mere declaration that it is or was too high. To reduce a rate, a lower rate must be *made effective*. So far as shipments during the Guaranty Period were concerned a lower rate could be made effective only by paying reparation.

Any action by the State Commission would therefore conflict with Section 208(a) only if it amounted to a decision that the payment of reparation could be enforced without the Interstate Commerce Commission's approval. Unless this was what the Commission decided in *Docket No. 3206* it did not decide the federal issue here raised and the State Court's impression that it did decide this issue was erroneous.

In determining whether this issue was decided by the State Commission, the Commission's decision must be read in the light of the issues submitted to it by the parties.

It must be remembered that the complaint in *Docket No. 3206* was filed prior to the termination of Federal control, that the hearings were had shortly thereafter, and that the case was submitted to the State Commission for determination when the Guaranty Period had only just commenced. As the case was submitted, therefore, the parties contemplated that the Commission's decision might be announced during the Guaranty Period and that the Commission might at that time make an order prescribing rates to become effective during the Guaranty Period. The contentions which were advanced were necessarily made with this in view. It would be surprising therefore if the parties had submitted to the State Commission for determination the question whether a reparation order if issued long after the termination of the Guaranty Period would support a cause of action in the courts under the Public Service Company Law without the approval by the Interstate Commerce Commission of a reduction in the rates.

At the argument before the State Court the following was read to the Court from the brief of the carriers, dated June 1, 1920, in *Docket No. 3206* setting forth the position taken by them in that proceeding:

> "The conclusion to which our reasoning leads and which, we submit, is that to which the Commission must adhere, is that Section 208(a) of the Transportation Act applies to intrastate rates and that it is constitutional. The necessary result is that all rates continued in effect pursuant thereto are lawful, but that this Commission has jurisdiction to consider this $1.10 rate to determine whether or not it is now reasonable. It may not order it reduced solely because it exceeds the rate fixed by this Commission in its order of December 10, 1917, but may do so, only after a finding based upon proper and conclusive evidence in this case, that the rate is unreasonably high. And even then its order for reduction must be approved by the Interstate Commerce Commission if it is to take effect prior to September 1, 1920."

From the foregoing it will be plainly seen that the carriers in submitting their contentions to the State Commission made a sharp distinction between the jurisdiction of the Commission to express an opinion on the reasonableness of a rate and its jurisdiction to enforce such an opinion by an order making effective a reduction. The former was admitted. The latter was denied without the Interstate Commerce Commission's approval.

We submit that as to the shipments during the Guaranty Period all that the Commission did in *Docket No. 3206* was to express an opinion on the reasonableness of the rate. That as to which its jurisdiction was challenged, the enforcement of a reparation order seeking to make effective a reduction in rates during the Guaranty Period, it did not do. Therefore we submit that its action cannot be taken as a decision that it had the power to do so. We believe further that no intent to render such a decision can be found in the Commission's report.

The report of the State Commission in *Docket No. 3206* which is in the record (R. 7-12) speaks for itself. We respectfully submit that nothing in that report will be found to indicate that the State Commission considered that it had before it the question which is the only question here in issue; namely, whether the approval of the Interstate Commerce Commission to a reduction in rates during the Guaranty Period would be necessary before an action to enforce a reparation order of the State Commission could be maintained under the Public Service Company Law. The State Commission did not even decide that the defendant-in-error was entitled to a reparation order but reserved consideration of this matter for a subsequent proceeding.

The most that the Commission can be said to have done in *Docket No. 3206* with respect to reparation was to announce that it would entertain a petition later to be filed for an award of reparation accompanied by "supporting data." What might thereafter happen was a matter of speculation only. In spite of the Commission's invitation the defendant-in-error might not have sought reparation or it might have failed to prove its damage or, as has been suggested, the Interstate Commerce Commission might have given its approval to a reduction in the rates. How can it be contended that the State Commission anticipated all of these possibilities?

The State Commission plainly considered that the inquiry into defendant-in-error's right to reparation would be a separate proceeding. And indeed when the petition for reparation was later filed the Commission gave the proceeding a new docket number and made a separate record. To support its claims the defendant-in-error had to prove that it had paid the freight charges as alleged and that it had suffered damage thereby. This it had not done in *Docket No. 3206,* and the Commission in that proceeding had made

no findings on these facts essential to a reparation award. Assuming, however, that the State Commission could be said to have decided in *Docket No. 3206* that a reparation order should be issued, there is certainly nothing in its report to indicate that it concluded that such an order could be enforced by a suit under Article V of the Public Service Company Law prior to an approval of the order or of a reduction in rates by the Interstate Commerce Commission.

In the face of this we submit that the impression of the State Court was entirely unjustified that the plaintiffs-in-error had submitted to the State Commission in *Docket No. 3206* the issues which are raised by their affidavits of defense in this suit or that these issues were decided by the Commission.

If the issue was not submitted and decided by the State Commission in *Docket No. 3206* obviously the contentions of the plaintiffs-in-error with respect thereto were not waived by their failure to appeal from that decision.

And since the State Court's decision was predicated upon an erroneous understanding of one of the fundamental facts of the case, namely, what was submitted to and decided by the State Commission in *Docket No. 3206,* we submit that the decision is not conclusive upon this court.

(e) The failure to appeal from the decision of the State Commission in Docket No. 3206 could constitute a waiver of the defense relied upon only if such an appeal could have presented the issues raised by the defense for adjudication. The State Court's decision that the defense had been waived was clearly erroneous since such an appeal would have been premature and could not properly have presented the issues for adjudication.

This is a suit to recover reparation. The action lies,

if at all, only because the State Commission has made the reparation order in favor of the defendant-in-error and the issue here is the enforcibility of such order. At the time when under the State statute an appeal could have been taken from the Commission's decision in *Docket No. 3206* no reparation order had been made by the Commission. The Commission had not determined that in its opinion the defendant-in-error was entitled to reparation. It was awaiting a petition with supporting data and proof of damage. Such a petition might never have been filed or the necessary proof of damage might not have been made. How can it be said therefore that if such an appeal had been taken it would have presented for adjudication the question whether a cause of action such as that here could be maintained?

More than this, the essential fact in support of the defense under Section 208(a) of the Transportation Act, 1920, is the lack of approval by the Interstate Commerce Commission of a reduction in the rate for the Guaranty Period. It was possible that following the decision in *Docket No. 3206* and prior to the issuance of a reparation order or prior to a suit for its enforcement the approval by the Interstate Commerce Commission of the reduction might have been sought and obtained. Had this been done the defense now relied upon could not be asserted. In other words, this defense depends upon the situation actually existing at the time proceedings were taken in this suit to give effect to the reparation order accomplishing the reduction.

We submit that an appeal taken in 1921 would have been premature to obtain an adjudication of an issue dependent entirely upon the facts existing at a later time when a suit might be brought to enforce a reparation order subsequently issued.

If an appeal could not present the issue for adjudication the failure to take an appeal obviously could not constitute a waiver of the contentions with respect thereto. And therefore the State Court's decision that the defense was waived is plainly erroneous and should not be held by this Court to deprive it of jurisdiction.

(1) The action of the plaintiffs-in-error in not appealing from the State Commission's decision in Docket No. 3206 was in accordance with the provisions of the Public Service Company Law as interpreted by the State Courts in previous decisions with which the decision in the case at bar is so plainly in conflict as to be arbitrary.

We submit that in taking no appeal from the Commission's decision in *Docket No. 3206* but awaiting the issuance of a reparation order, and then defending suit to enforce this order, the plaintiffs-in-error were acting strictly in accordance with the requirements of the State Public Service Company Law as construed by the courts of the State and that the State Court should not be permitted by a sudden reversal of its own decision to deprive the plaintiffs-in-error of their defenses under a federal statute.

In considering the pertinent portions of the State statute and the State Court's decision with reference thereto it is again important to bear in mind that as the shipments, the charges on which are involved in this suit, had been transported nearly a year before the Commission's decision in *Docket No. 3206* had been announced, and as at the time the transportation had been performed the charges had all been paid on the basis of the rate in effect on February 29, 1920, the only bearing which the decision of the Commission in *Docket No. 3206* could have had on such shipments was with respect to reparation, *i. e.*, a refund of a portion of the freight charges paid. It must also be remembered that, while the Commission in *Docket No. 3206* decided that

the rates paid were unreasonable it made no reparation order but expressly withheld action on the question of reparation for a subsequent proceeding.

Since there was no duty to pay reparation until the issuance of a reparation order and since in fact the payment of such reparation would probably have been unlawful until a finding by the State Commission that the party claiming reparation was entitled thereto and until the issuance of an order in its favor, the plaintiffs-in-error conceived that in view of the statutory provisions just quoted the only procedure for them to adopt was to await the issuance of a reparation order and then to contest a suit brought thereon for its enforcement. That this was the proper course had been indicated by several decisions of the state courts.

The State Commission's decision in *Docket No. 3206* was announced in August, 1921. A year before that time in *Newport & S. V. RR. Co.* v. *Public Service Comm.*, 75 Pa. Superior Ct. 28, the Superior Court of the State had held that an appeal would not lie to review a decision of the State Commission that rates collected in the past had been unreasonable and that the plaintiff was entitled to reparation. The Court in its opinion said at page 31:

> "Section 5, article V, of the statute, provides that on failure to comply with an order for reparation '* * * the person named therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be prima facie evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit * * *.' See *New York and Pennsylvania Co.* v. *New York Central R. R. Co.*, 267 Pa. 64.
>
> "As the statute prohibits an appeal from an order

for reparation and provides for its enforcement by suit in the common pleas, and as we cannot anticipate questions that may arise in such suit, if brought, we must refrain from discussing the merits now."

In April, 1920, the Supreme Court of the State in *New York & Pennsylvania Co.* v. *N. Y. C. RR. Co.*, 267 Pa. 64, had clearly held that under the provisions of the Public Service Company Law a proceeding for reparation was to be separate from a proceeding in which the Commission was asked to determine merely the question of the reasonableness of rates.

The views of the plaintiffs-in-error with respect to the requirements of the State law were further confirmed by decisions of the state courts in another case with which the decision of the Supreme Court of the State in the case at bar appears to be wholly irreconcilable.

In *Lehigh & New England R. R. Co.* v. *Public Service Commission*, 79 Pa. Superior Ct., 540, affirmed in 277 Pa. 493, there was before the Pennsylvania courts an appeal taken from a decision of the Public Service Commission under circumstances practically identical with those which would have been before the Court had the plaintiffs-in-error here appealed directly from the Commission's decision in *Docket No. 3206*. The State Commission had considered a complaint against the Lehigh & New England Railroad Company alleging that certain intrastate rates on coal maintained by this railroad were and had been unreasonable. The complaint prayed the establishment of rates for the future and also an award of reparation on shipments moving in the past. Although the complaint was filed during the Guaranty Period the decision of the Commission, like that in *Docket No. 3206*, was not announced until a year after the Guaranty Period had expired. The Commission de-

cided that the rates charged had been unreasonable, made an order directing the railroad to file a tariff providing for the future the rate found by it to be reasonable, and as to the shipments which had moved in the past did as it did in *Docket No. 3206,* announced that it retained "jurisdiction of the case in the matter of reparation." As the railroad sought to contest the order fixing the rates for the future it took an appeal under the provisions of the Public Service Company Law directly from the State Commission's order to the Superior Court of the State. It also sought to contest the decision of the Commission that the rates in the past had been unlawful and on its appeal raised the question of the power of the Commission to award reparation on shipments moving during the Guaranty Period. Let it be remembered that this was an appeal, not from the reparation order, but from a decision similar to that in *Docket No. 3206,* that the rates collected had been unlawful during the Guaranty Period and that it would later consider an application for reparation. In other words, the railroad took the very action, the failure to take which was said by the Court below in the case at bar to constitute a waiver of the defense relied upon.

But in that case the State Court said, as we believe to be the fact, that the appeal was premature to raise the objection sought to be interposed to the granting of reparation and that the parties should await the issuance of a reparation order and should test the validity of that order by a suit for its enforcement. The decision of the Superior Court dismissing the appeal from the Commission's decision was affirmed by the Supreme Court of the State. Since the reparation issue was discussed more fully in the opinion of the Superior Court we quote from that opinion and we direct the attention of this Court to the fact that the opinion clearly shows that the issue sought to be raised

on appeal, insofar as the matter of reparation was concerned, was the same issue that the plaintiffs-in-error here seek to have adjudicated and that the Court held that an adjudication could not be obtained by such an appeal but must be had in the manner pursued by the plaintiffs-in-error here, namely: the reparation order must first be issued and then sued upon. At page 554 of his opinion Mr. Justice Linn said:

> "4. Appellant objects that the commission retained 'jurisdiction of the case in the matter of reparation.' It contends that the Transportation Act prohibits granting reparation by providing in section 208a that the rates in effect on February 29, 1920, when federal control terminated, 'shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced * * * unless such reduction or charge is approved by the (Interstate Commerce) Commission.' During federal control both interstate and intrastate rates were made effective from time to time by the railroad administration, pursuant to Congressional authority. Necessarily during that period, state statutes prescribing how intrastate rates should become effective, were in abeyance. *N. P. R. Co.* v. *North Dakota,* 250 U. S. 135. In order that there might be no question that the rates prescribed by the railroad administration, and not the intrastate rates which had been effective pursuant to state statutes when federal control was taken, should continue effective on March 1, 1920, section 208a prescribed the status of the rates on the first of March, 1920, and until changed as specified. *Whether or not the section prohibits the granting of reparation is not before us on this record; at best that part of the order is interlocutory. There is nothing showing what questions may be raised on the subject.* Moreover, article VI, section

17 of the Public Service Company Law, July 26, 1913, P. L. 1374, provides that '* * * There shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided.' Article V, section 5, provides for reparation specified, and it is apparent from the opinion written by Mr. Justice SIMPSON, in *N. Y. & P. Co.* v. *N. Y. C. R.R. Co.*, 267 Pa. 64, that article V, section 5 'plainly requires the petition for reparation to be filed after the final decision on the question of the reasonableness of the rates.' Accordingly, the power company's prayer for reparation contained in the complaint that the rate was unreasonable, perhaps amounts to no more than notice that claim for reparation will be made if the rate be held unreasonable. We cannot reverse because the commission has given notice that it will hear a claim for reparation if presented by the power company." (Italics ours.)

The following language from pages 502 and 503 of the opinion of the Supreme Court indicates that it was likewise the view of that Court that the question of the effect of Section 208(a) upon a complaint for reparation on shipments during the Guaranty Period could not finally arise until an order of reparation had been issued.

"Section 208(a) does not prohibit a complaint from being filed against a rate established during federal control for the guarantee period. It does prohibit a reduction in rates without the approval of the Interstate Commission. The Superior Court found from the record sufficient evidence to sustain the state commission's order, and that the reduction was not confiscatory. Without considering the proceedings before the Interstate Commerce Commission on the complaint there filed, and, assuming the state's action was on a rate not before assailed, *if we affirm this order the carrier is not injured until the state commission's order is approved by the fed-*

eral commission, and afterwards only on an order of reparation.'' (Italics ours.)

We submit therefore that the decision of the Supreme Court of Pennsylvania in this case that the issues raised by the affidavits of defense should have been raised for adjudication by an appeal from the State Commission's decision in *Docket No. 3206* and that the plaintiffs-in-error by failing to appeal from that decision waived their defense, is directly contrary to the provisions of the Public Service Company Law as interpreted by the same Court in the other cases just cited.

There is a further point which is worthy of observation here and which confirms the arbitrary character of the decision of the Court below. The Public Service Company Law provides that in a suit for reparation the reparation order of the State Commission shall be only *prima facie* evidence of the facts therein stated. It is similar to the provision contained in Section 16 of the Interstate Commerce Act (41 Stat. L. 491) in which a reparation order of the Interstate Commerce Act is made *prima facie* evidence of the facts therein stated.

The purpose of these provisions is obviously to preserve to the carriers their constitutional right to a trial by jury on the question of damages by guaranteeing to them the opportunity in a suit to enforce a reparation order to submit to a jury evidence to disprove the findings under the statute. The finding of the Commission merely operates to shift the burden of proof to the carrier. If, however, a reparation order were conclusive evidence of the facts therein stated it is clear that there would be no question to be submitted to a jury. A reparation order would be open to attack only upon legal grounds with the result that a trial by jury of the essential questions of fact

would be denied. The Court below has held in effect that if carriers fail to appeal from a decision of the State Commission that reparation will later be awarded, the State Commission's decision becomes conclusive and the reparation order subsequently issued is not open to attack.

The effect of the decision of the Court below therefore is to construe the Public Serivce Company Law in such a way as to render a reparation order not *prima facie* evidence, but actually conclusive in that it is open to objection only upon certain legal grounds. The decision is therefore directly in conflict with the terms of the State statute itself providing that a reparation order shall be only *prima facie* evidence and it places upon the State statute a construction which renders the statute unconstitutional in that it deprives carriers of the rights guaranteed to them by the due process clause of the Constitution.

We submit that since the plaintiffs-in-error in seeking an adjudication of the federal question have acted in conformity with the provisions of the State law as construed in previous decisions of the State Courts, this Court should not now refuse to decide the federal question merely because the State Court in a decision so entirely at variance with its previous decisions and the statute itself as to be essentially arbitrary, has held that the plaintiffs-in-error have not pursued the proper procedure to present the federal question for determination.

(g) The cases cited by defendant-in-error in support of its motion to dismiss do not require dismissal of the writ of error on the facts in this case.

In view of the cases previously cited and the circumstances of this case above described, it is submitted that the authorities cited by the defendant-in-error in support of its motion to dismiss do not require that this Court should decline to review the decision of the Court below.

The first case cited is *Enterprise Irrigation District* v. *Canal Co., supra.* In that case there was drawn in question the controlling effect upon the parties to the suit of a decision of the State Board of Irrigation. By the plaintiff-in-error it was contended that the decision could not be given conclusive effect consistently with due process and the equal protection clause of the Fourteenth Amendment. By the defendant-in-error it was, among other things, contended that the plaintiff-in-error was estopped to maintain the suit by its conduct subsequent to the Board's decision. This Court held that the first question was a federal question and the other a non-federal question, that they had both been resolved in favor of the Canal Company by the State Court, that the defense of estoppal *in pais* was an independent ground of judgment and being sufficient to sustain the decision the judgment of the State Court would not be disturbed.

We contend first that that case is not an authority requiring a similar conclusion in the case at bar since here the federal issue goes to the entire case. But further than this we believe that the present case is of the sort described by Mr. Justice Van Devanter, in the language already quoted from his opinion in this very case at pages 40 and 41 of this brief in support of our contention that this is a case where the decision of the State Court will be reviewed.

The next case cited by our opponent is *Minnesota, etc., Ry.* v. *Washburn Co.*, 254 U. S. 370. It appeared in this case that the State legislature had prescribed a schedule of maximum rates for the transportation of coal by railroad between points within the State. Suit was brought for an injunction restraining the railroads from disobeying the law and collecting rates in excess of those therein named. The injunction was awarded and judgment was affirmed on appeal without prejudice to the rights of the carriers to reopen the case if after an adequate trial the rates proved to be confiscatory. Later the carriers did re-open the case and on appeal it was held that the rates were confiscatory and the injunction was dissolved. The railroads during the pendency of the injunction had obtained no order saving their right to demand or collect any rates in excess of those prescribed by the statute. This suit was brought to recover additional amounts on shipments transported prior to the dissolution of the injunction. On appeal to this Court it was contended that the rates charged were confiscatory. This Court, however, held that the State Court had decided against the carrier on the grounds (1) that there was no contract to pay any rate other than that shown in its tariff published in accordance with the statute, (2) that the injunction had been awarded without taking any bond securing to the carrier the right to collect additional amounts, and (3) that there was no claim that the shipper had been unjustly enriched at the expense of the railroad since the shipper was no more responsible for the situation than the carrier. These grounds were all entirely apart from the federal question which was not passed upon by the State Court.

It is plain, we believe, that the dismissal of a writ of error on such facts affords no precedent for dismissing the writ of error in the case at bar. In the case cited the

soundness of the State Court's decision could not be questioned. In its decision it did not undertake to pass upon the federal question at all as did the Court below here, its decision on the state ground was not based upon a misconception of the facts and issues and the state ground was entirely independent and distinct from the federal issue which, as we contend, is not the fact in the case at bar.

In the case of *Nickel* v. *Cole,* 256 U. S. 222, the next case cited by our opponent, the question involved was whether a transfer tax had been properly assessed on a certain transaction under the provisions of the State statute. The answer to this question turned upon whether the transfer in question was a transfer of the character to which the statute by its terms was applicable. This was clearly a question of the interpretation of a State statute and this Court held that the decision of the State Court was binding upon it. The Court, however, limited the instances in which it would feel compelled to adopt the State Court's view by the following language which, as we believe, excludes from that category the case at bar (p. 225):

> "But the answer to this is that when as here there can be no pretense that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong."

Howat v. *State of Kansas,* 258 U. S. 181, cited by our opponent, was simply one of a number of cases in which this Court has found that the case had been disposed of by the State Court without any consideration of the federal question and upon state grounds with which it agreed, and under these circumstances has declined to consider the federal question. The case is of no assistance in determining

whether the facts in the case at bar support the jurisdiction of this Court to review the decision of the State Court.

One other case recently decided, although not cited by our opponent, is worthy of comment, *Central Union Telephone Co.* v. *City of Edwardsville,* 70 L. ed. (Adv. 113), decided by this Court November 23, 1925. That was a suit to recover taxes claimed to be due under a local ordinance imposing a tax of 50 cents a telephone pole on every person, firm or corporation owning, controlling or operating poles in the streets of Edwardsville. It was contended by the telephone company that this ordinance deprived it of its property without due process of law and impaired the obligation of a contract represented by an earlier ordinance permitting the telephone company to occupy the streets. The Trial Court held that the earlier ordinance was not a contract and that therefore the tax ordinance was not unconstitutional as impairing a contract. An appeal was taken to the State Appellate Court which transferred the case to the Supreme Court of the State on the ground that the Appellate Court had no jurisdiction. The Supreme Court held that the case had been improperly transferred to it because of the appeal to the Appellate Court and therefore remanded the case to the latter court where the judgment of the Trial Court was affirmed. Certiorari to the Supreme Court of the State was then obtained and in such proceeding that Court declined to hear the constitutional questions on the ground that they had been waived by the failure to take the case directly from the Trial Court to the Supreme Court for a review of these questions as required by the State law as theretofore interpreted by numerous decisions of the State Courts. On these facts this Court in turn declined to consider the constitutional questions and dismissed the writ of error.

It may be argued that that decision is a precedent requiring a dismissal of the writ of error in the case at bar, for therein this Court refused to disturb the decision of the Court below that under the State practice the constitutional question had been waived. However, we direct attention to the following very significant features of the decision in that case which, we believe, far from requiring a dismissal of the writ of error here, support our contention that the Court has jurisdiction in the present case.

In the first place, it will be observed that the decision of the State Court with regard to the requirements of the State practice was consistent with a long line of cases construing the State procedural statute. This fact was expressly commented upon by this Court. In the case at bar, on the other hand, as we have pointed out, the decision of the State Court that the State law required an appeal from the Commission's decision in *Docket No. 3206* in order to save the federal question was directly contrary to previous decisions of the same Court construing the same statute.

Moreover, it will be seen that this Court in the case cited held that it would follow the decision of a State Court that a federal question had been waived under the State practice only "if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that Court." For the reasons which have been set forth earlier in this discussion we submit that a practice requiring an appeal from the Commission's decision in *Docket No. 3206* would not have given the plaintiffs-in-error a reasonable opportunity to litigate the federal question, since this federal question depended upon conditions not existing at the time such an appeal must have been taken. This Court gives further emphasis to the fore-

going limitation of its opinion by stating: "It seems to us that the practice under the statute of Illinois, above quoted, is entirely fair." We submit that the practice under the law of the State of Pennsylvania as construed by the State Court in the present case would be entirely *unfair* and that therefore a decision based upon such practice should not be considered by this Court controlling upon it.

Finally, there is a very fundamental distinction between the two cases upon the facts involved, which distinction, as we believe, amply confirms our contentions as to the Court's jurisdiction here. In the *Central Union Telephone Company Case, supra,* the facts which gave rise to the federal question and upon which the determination of that question depended were all in existence at the conclusion of the proceeding in the Trial Court and at the time the appeal to the Supreme Court should have been taken, as the State Court found. In the case at bar, on the other hand, as we have seen, the facts upon which the defense under Section 208(a) of the Transportation Act, 1920, is predicated were not in existence at the time the State Commission's decision in *Docket No. 3206* had been announced. No reparation order had been issued, none might ever be issued. Before such an order might be sought to be enforced the Interstate Commerce Commission's approval might have been obtained. The State Commission did not decide the issue of the enforcibility of a reparation order without such approval and to whatever Court an appeal might have been taken such an appeal could not present issues depending upon facts not then in existence.

II

EVEN IF THE WRIT OF ERROR WAS IMPROPERLY SOUGHT THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI IN ORDER TO REVIEW THE DECISION OF THE COURT BELOW.

For the reasons indicated we have believed that the contentions advanced in defense of the suit below brought in question the validity of the State statute or order of the State Commission and that therefore since the decision of the State Court was in favor of their validity the jurisdiction of this Court was properly invoked by application for writ of error. We conceive, however, that it may be a close question whether the defense asserted raises a question of the validity of the State statute and of the State Commission's order or whether it amounts to the assertion of a right under a federal statute which has been denied by the State Court. Probably it does both.

The railroads claim that under Section 208(a) of the Transportation Act, 1920, they had a right to charge the freight rates which were collected upon the shipments here involved and they assert this claim because Section 208(a) of the Transportation Act, 1920, provided that the rates in effect on February 29, 1920, should continue in effect until thereafter changed by State or Federal authority or pursuant to authority of law and should not be reduced prior to September 1, 1920, without the approval of the Interstate Commerce Commission, and because that Commission has never approved any reduction in the rates charged as applied to shipments moving during that period. If this is an assertion of a right under a federal statute, the decision of the State Court that the railroads were not entitled to charge the rates which they claimed to be lawful under

the Transportation Act, 1920, was a denial of this right and the case is one which this Court under Section 237 of the Judicial Code may review on writ of certiorari.

Because of the doubt as to the exact character of the defenses asserted a petition for writ of certiorari has been filed with this Court, and has not yet been acted upon.

In opposition to the issuance of this writ it is urged by our opponent as it has been urged in support of the motion to dismiss the writ of error, that the decision of the State Court with respect to the failure to appeal from the State Commission's decision in *Docket No. 3206* should prevent a review of the case by this Court.

In support of our petition for writ of certiorari we argue, for the reasons already advanced under the previous point in this brief, that the State Court's decision was not on an independent state ground, and moreover that it was so patently erroneous and unfair to the petitioners that it should not be considered binding on this Court.

We believe that a federal question is involved and that the circumstances of the case justify a review by this Court of the decision of the Supreme Court of Pennsylvania, whether this review be had on writ of error or on writ of certiorari.

III

BY REASON OF SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, THE FACT THAT THE CHARGES COLLECTED ON SHIPMENTS MOVING BETWEEN MARCH 1 AND SEPTEMBER 1, 1920, WERE COMPUTED ON THE BASIS OF THE RATE IN EFFECT ON FEBRUARY 29, 1920, AND THE FURTHER FACT THAT NO REDUCTION IN THAT RATE FOR THE PERIOD PRIOR TO SEPTEMBER 1, 1920, HAD OR HAS BEEN APPROVED BY THE INTERSTATE COMMERCE COMMISSION CONSTITUTE A COMPLETE DEFENSE TO THE SUIT OF THE DEFENDANT-IN-ERROR UNDER ARTICLE V, SECTION 5, OF THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA TO ENFORCE THE REPARATION ORDER MADE BY THE STATE COMMISSION RELATING TO SUCH SHIPMENTS.

> "SEC. 208(a). All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

The foregoing language of Section 208(a) of the Transportation Act, 1920, is so clear and so unambiguous that only two arguments, both of them, as we believe, unsound, have been suggested in support of the contention advanced by the defendant-in-error that the defense asserted by the

carriers in this case was not a good and complete defense under the provisions of this federal statute. The two points thus urged are, *first*, that Section 208(a) of the Transportation Act, 1920, had no application to intrastate transportation during the Guaranty Period either because by its terms it did not relate to such transportation or because, if it purported to do so, it was unconstitutional; and *second*, that even if Section 208(a) was applicable to intrastate rates, the reparation order of the State Commission in *Docket No. 738*, to enforce which this suit was brought, was not a reduction of a rate or, if enforced, would not result in a reduction of a rate and therefore did not come within the prohibition of the last clause of Section 208(a) prohibiting any reduction prior to September 1, 1920, without the approval of the Interstate Commerce Commission.

A. SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, WAS INTENDED TO AND BY ITS TERMS DID APPLY TO INTRASTATE TRANSPORTATION.

We think it can not be seriously questioned that Section 208(a) of the Transportation Act, 1920, was intended to relate not only to interstate but also to intrastate rates. Were this not so there would be no meaning in the reference to "State authority" in the first clause of the section, providing that the rates in effect on February 29, 1920, should continue in force "until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law." For it is obvious that "*State* authority" could not be exercised to change *interstate* rates. Moreover, this description in the first clause of the section is "*all* rates, fares and charges." There is no intimation that the word "all" is to be construed as meaning "all *interstate* rates, fares and charges."

That the last clause of the section prohibiting a reduction prior to September 1, 1920, without the Interstate Commerce Commission's approval is equally applicable to state rates is apparent from its language. For the rates which are not to be reduced are described as "any *such* rate, fare, or charge," the "such" necessarily referring to the rates, fares and charges described in the first clause of the section.

The purpose of the section renders this conclusion inescapable. During the period of Federal control the President through the Director General of Railroads had authority to prescribe both intrastate and interstate rates, state laws and orders to the contrary notwithstanding. *Northern Pacific Ry.* v. *North Dakota, supra.* In the exercise of this authority the President increased both interstate and intrastate rates to a level very substantially higher than that in effect prior to Federal control and in many instances higher than permitted by State statutes or orders. At the termination of Federal control it was obviously necessary to provide some means of stabilizing the transportation machinery of the country until a reasonable opportunity should be afforded for readjustment to private control and operation. If in lieu of the rates established by the Director General of Railroads there were immediately to be substituted rates which might be required by State laws or regulations a condition of chaos would have been inevitable. There can be no doubt that the purpose of Section 208(a) was to meet this situation and to provide a firmly stable and compensatory basis of rates during the period of readjustment. There is therefore every reason why Congress should have intended to continue in effect both the interstate and intrastate rates which had been established by the Director General, until further action by the State and Federal authorities with reference thereto which would take into consideration the changed conditions which had

arisen during the period of federal operation. Indeed it was the very fact of the existence of the State laws which made especially necessary some provision by Congress for the continuance of a stable rate structure, for it was largely State laws that fixed rates which had been exceeded by the Director General. So that if Section 208(a) as a whole did not apply to intrastate rates it would have failed to meet one of the conditions most requiring its enactment.

This is the more apparent when the further and special purpose of the particular clause here in issue is considered, the clause prohibiting a reduction in rates prior to September 1, 1920, without the Interstate Commerce Commission's approval. The period from March 1 to September 1, 1920, was the period during which by Section 209 of the Transportation Act, 1920, Congress guaranteed the revenues of the carriers which had been under Federal control. The fact that it was during this period that this clause prohibited reductions in rates without the Interstate Commerce Commission's approval makes it clear that by this clause Congress was seeking not only to maintain a stable rate structure for the convenience of the carriers and shippers, but also and primarily to protect itself under the guaranty. Congress primarily intended that so long as it guaranteed the carriers' revenues their rates should be under Federal supervision. This intent must therefore have been aimed chiefly at the state rates since interstate rates were under Federal supervision without such a provision.

That Section 208(a) was intended to apply to state rates is further borne out by incidents occurring during the history of the legislation.

The bill which later became the Transportation Act, 1920, was reported by the House Committee on Interstate Commerce November 10, 1919, Report 456, 66th Congress.

In this report the committee made the following reference to Section 208(a):

> "In view of the enormous increase in operating costs of carriers, due to increased wages and cost of materials, restoration to former level would result in such enormous decrease in revenues as would render it utterly impossible, even for the stronger railroads, to meet operating expenses. By the insertion of the above section, the existing rates, fares, charges, etc., are to continue in force and effect until changed by or pursuant to authority of law; that is, until changed by the appropriate regulatory body."

The chairman of the House Committee in presenting the bill spoke of the provision as follows:

> "It is apparent that unless we put in a provision of this kind, then as soon as the Federal control ended all the rates made under Federal control would cease and the rates would revert to their pre-control status—both interstate and intrastate. It is clear to all that that would be calamitous. If the rates of the railroads now existing as fixed by the director general, should suddenly be brought to a precontrol level there would scarcely be a railroad in the United States that could begin to pay operating expenses. * * * If control ceases without this section in the bill, the rates would be dropped 25 per cent. on freight and 50 per cent. on passengers, with the consequences I have already stated" (Congressional Record, Nov. 11, 1919, p. 8314).

It is especially significant that after it had been pointed out to the House by a member of that committee that the language then contained in the bill was intended to reach both state and federal authority, a member of the House proposed to amend the bill by inserting the following:

> "Provided, that nothing in this section shall be construed to include intrastate shipments."

To this proposed amendment the member in charge of the bill replied:

> "That is not the intention. They are continued until the proper State authorities can pass upon them. Otherwise they would come back to pre-war rates" (Congressional Record, Nov. 13, 1919, p. 8451).

It will be observed that the amendment was not embodied in the bill as passed.

We therefore submit that Section 208(a) of the Transportation Act, 1920, was intended to, and by its terms did, apply to intrastate as well as to interstate rates and that the clause prohibiting a reduction in rates prior to September 1, 1920, without the approval of the Interstate Commerce Commission was intended to be a restriction upon the State authorities.

B. SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, IS NOT UNCONSTITUTIONAL AS APPLIED TO INTRASTATE RATES.

It is urged that if Section 208(a) applied to intrastate rates it must be unconstitutional as an unwarranted interference by the Federal Government with State power. This contention, we believe, overlooks the true character of the legislation, which is not and did not purport to be a permanent interference with State's rights but was merely legislation looking to a demobilization of the national resources following the termination of the war. That legislation looking to demobilization is as much within the war power of Congress as legislation relating to the initiation or active carrying on of war is well settled. *Commercial*

Trust Co. v. *Miller,* 262 U. S. 51. 57; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264; *Dryfoos* v. *Edwards,* 284 Fed. 596.

The assumption by the Federal Government of the operation of the railroads of the country was justified as an exercise by the Federal Government of its war power and it was on this ground that it was held in the *North Dakota Case, supra,* that an intrastate rate established by the Director General pursuant to the terms of the Federal Control Act was not unlawful merely because it was contrary to the requirements of a State statute or the orders of a State regulatory body.

If the taking over of the railroads and their operation by the Federal Government was a proper exercise by Congress of its war power then it logically follows, we believe, that the return of the railroads to their private owners was likewise a proper exercise of this same power. For it must be plain that the taking over of the railroads and their operation during the continuance of the war involved their return at the war's conclusion. As was said by this Court in the case of *Stewart* v. *Kahn,* 11 Wall. 493, 507:

> "* * * the [war] power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and *to remedy the evils which have arisen from its rise and progress.*" (Italics ours.)

We submit that since, as this Court has held, Congress in the exercise of its war power could deal with intrastate rates regardless of State regulation, it could likewise in the exercise of the same power in providing for the termination of federal operation enact such legislation with respect to intrastate as well as interstate transportation

as was reasonably necessary for such termination and for the return of the railroads to their owners. And we submit that Section 208(a) of the Transportation Act, 1920, was legislation reasonably appropriate to this end.

This view was clearly stated by the Court of Appeals of New York State in *Public Service Commission* v. *New York Central R. R.*, 230 N. Y. 149, 153, where it said:

> "Yet the process of readjustment was complex. And the power to seize the roads carried with it such reasonable power as was needed to bring about that readjustment in an orderly and equitable manner. The government had operated competing roads as part of one system. It had distributed cars as its needs required. It had increased the wages of employes. It had fixed the rates of fare both interstate and intrastate. The public good required that the normal state of affairs should be re-established with the least possible disturbance. Congress was well within its rights, therefore, when it provided that the tariffs in force on February 29, 1920, should continue until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, and in no case should be reduced before September 1, 1920, without the approval of the Interstate Commerce Commission."

In *Michigan Central R. R. Co.* v. *Michigan Pub. Utilities Comm.*, 271 Fed. 319, on application for a preliminary injunction restraining the State Commission from enforcing a Michigan statute fixing a rate of 2½ cents a mile for passenger transportation immediately upon the expiration of the Guaranty Period, September 1, 1920, a special court of three judges said as follows (p. 324):

> "We find it unnecessary to consider these contentions, because we think the congressional right to effectuate the intent which we have found in sec-

> tion 208a is sufficiently based on the war power. The right to fix intrastate rates during federal control and as incidental to the war power is settled. *Northern Pac. Co.* v. *North Dakota,* 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L.Ed. 897. It is also beyond dispute—indeed, it is not denied by the Attorney General here—that the same power would extend to and cover federal regulation of state rates for a reasonable transition period (*Stewart* v. *Kahn,* 78 U. S. [11 Wall.] 493, 506, 20 L.Ed. 176), as incidental to the return of the railroads to their owners, covered by a shield which should prevent their immediate destruction; but it is claimed that the six months from March 1st to September 1st, during which the federal guaranty continued, exhaust such transitional or twilight period, * * *"

Under these circumstances the contention which has been advanced and which was adopted by the Court below (R. 94) that the rate involved in this case was not subject to the Federal statute because it in no way affected interstate commerce or resulted in discrimination against such commerce must fail. It would be otherwise if the authority for the enactment of the statute were to be sought in the power of the Federal Government to regulate interstate commerce. But the applicability of Section 208(a) of the Transportation Act, 1920, to the state rate in the present case depended not upon the power of Congress to regulate interstate transportation but upon the authority of Congress in the exercise of its war power to enact legislation touching intrastate transportation.

C. THE PROHIBITION OF SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, OF A REDUCTION OF RATES DURING THE GUARANTY PERIOD WITHOUT THE APPROVAL OF THE INTERSTATE COMMERCE COMMISSION RENDERS UNENFORCIBLE UNDER THE STATE LAW A REPARATION ORDER OF A STATE COMMISSION AWARDING REPARATION ON INTRASTATE SHIPMENTS IN THE AMOUNT OF THE DIFFERENCE BETWEEN THE RATE IN EFFECT ON FEBRUARY 29, 1920, AND A LOWER RATE UNLESS REDUCTION APPROVED BY THE INTERSTATE COMMERCE COMMISSION.

If, as we have argued, Section 208(a) of the Transportation Act, 1920, was applicable to intrastate rates, there can be little doubt that it would have prohibited the enforcement of an order of the State Commission issued in March, 1920, directing the carriers immediately to establish a through rate of $1.00 in lieu of the rate of $1.10 in effect on February 29, 1920, unless such reduction had had the approval of the Interstate Commerce Commission.

We submit that the enforcement of the reparation order in *Docket No. 4738* comes equally within the prohibition of Section 208(a).

This order requires the carriers to refund to the defendant-in-error the difference betwen the freight charges collected on its shipments moving during the Guaranty Period on the basis of the $1.10 rate and a lower rate of $1.00 which according to the State Commission's view would have been the maximum reasonable rate for the period in question. In substance, the enforcement of the reparation order would effect a reduction in the rates charged during this period, for its result would be to put the parties in the position in which they would have been had the reduced rate of $1.00 been published and charged at the time the shipments moved. True, it would be a retroactive reduction, but there is nothing in the language of Section 208(a) to indicate

that it was only prospective reductions of rates which came within the prohibition contained therein. Furthermore, the entire purpose of the provision indicates that such could not have been its meaning.

By Section 209 of the Transportation Act, 1920, Congress, in order to stabilize the transportation system of the country following the termination of federal operation and during the process of readjustment to the operation of the roads by their corporate owners, guaranteed the revenues of the railroads for a period of six months after March 1, 1920. It was but natural that in making this guarantee Congress should likewise take precautions to protect the Federal Government from undue demands under this guarantee, resulting from a sudden falling off in the carriers' revenues caused by reductions in their rates either voluntary or required by State regulatory authorities.

We believe that it was clearly for this purpose that the last clause was inserted in Section 208(a) to the effect that no reduction in rates should be made during the Guaranty Period without the approval of the Interstate Commerce Commission.

In the case of *New York Central R.R. Co.* v. *Public Service Comm.*, 268 Fed. 558, the Court expressed this view of the purpose of this clause saying:

> "The continuance of the Federal rates for six months from March 1, 1920, was coincident with the Government's guarantee of just compensation to the railroads for this period provided in Section 209 and is a protection to the Government."

From Section 209 it will be seen that that which the Government guaranteed as to every carrier which had been

under Federal control was "the railway operating income of such carrier for the Guaranty Period." Other portions of the Act make it clear that by this was meant the railway income received by the carrier from its operations during that period. We submit that if a carrier receiving from these operations a certain amount based upon the rates then in effect should thereafter be required to refund a portion of the amount so collected on the theory that the rates were too high, the net result would be that the carrier would have received from its operations during the Guaranty Period only charges on the basis of the reduced rates and the obligation of the Federal Government under its guarantee would depend upon how much the net amount retained by the carrier as compensation for its operation during the Guaranty Period should fall short of the amount which Congress guaranteed to the carrier from these operations. Since the purpose of the last clause of Section 208(a) was patently to protect the Federal Government in its guaranty it follows that Congress in enacting this clause must have intended to prohibit, except with the Interstate Commerce Commission's approval, retroactive as well as prospective reductions which would operate to reduce the revenues derived by the carriers from operations during the Guaranty Period.

It has been suggested that the reparation order is an award of damages and is therefore something different from a reduction in rates. Such seems to have been the view of the Supreme Court of California in the case of *Southern Pacific Co.* v. *Railroad Comm.*, 194 Cal. 734, 231 Pac. 28, which was a case quite similar to the case at bar. We submit, however, that this contention disregards entirely both the substance of the transaction and the purpose sought to be attained by the statute, as above outlined; and also overlooks the true character of an award of reparation un-

der these circumstances. The primary purpose of an award of damages in a case such as this is to put the parties as nearly as may be in the position in which they would have been had the alleged unlawful act not been committed. The act here alleged to have been unlawful was the collection of a freight rate higher than the rate of $1.00 which the State Commission found would have been reasonable and the purpose of the reparation order was to adjust matters as between the parties to the case so that they would be in the position in which they would have found themselves had the carriers in the first instance collected the $1.00 rate. Certainly whatever this may be called it is an actual making effective of a reduction in the rate. And if without the Interstate Commerce Commission's approval the carriers could not have been required in advance to collect $1.00 instead of $1.10, how can they now without such approval be required to adjust matters in the name of "damages" so that it will be as if they had actually collected but $1.00?

It is beyond belief that there should be imputed to Congress any such disingenuous motive as would be indicated by a statute which would have this effect. By such a statute Congress would have told the carriers: "We guarantee your earnings for six months and we won't let your rates be reduced during that period without our approval," and would later have said to them: "Now that you have collected the rates which we ordered you to maintain we have fulfilled our guarantee, as we made no undertaking to you that we would protect you from countless suits and claims for damages for the collection of these very rates which we required you to maintain, which suits will deplete your treasury as effectively as if the rates had been reduced in advance, but will take the depletion out of you after our guarantee has ended rather than out of your current revenues during the time that we guaranteed them."

Further, it has been suggested by the defendant-in-error, and the suggestion seems to have been accepted by the Supreme Court of Pennsylvania, that for some reason the enforcement of the reparation order of the State Commission would effect a "correction" and not a reduction in rates—as though a correction which reduces were not a reduction. The facts upon which this suggestion has been predicated are that the State Commission in 1917, long prior to Federal control, ordered a reduction in the then existing rate of one of the plaintiffs-in-error, namely, the rate of the New York Central Railroad Company from the mines to Bald Eagle Junction; that the rate of $1.10 established by the Director General and in effect on February 29, 1920, which was charged upon most of the shipments involved in this suit, was arrived at by adding the increases prescribed by the Director General in his General Order No. 28 not to the reduced rate which the State Commission had prescribed in 1917, but to the rate which the State Commission had then found unreasonable; and finally that the rate of $1.00 which it was the purpose of the reparation order here sued upon to render effective is the rate which would have resulted had the General Order No. 28 increases in rates been computed with reference to the rate fixed by the State Commission's order of July, 1917.

However, Section 208(a) of the Transportation Act, 1920, prohibits reductions during the Guaranty Period without the Interstate Commerce Commission's approval not only in rates which were the result of the application of General Order No. 28 to rates previously approved by State administrative tribunals prior to Federal control, but in *all* rates in effect on February 29, 1920 (without reference to how they may have been computed). No language of the statute requires us to ascertain how these rates were arrived at so long as they were in effect. Applying the plain

language of this statute to the situation in the case at bar we find that the rate charged on the shipments here involved was $1.10 which was the rate in effect on February 29, 1920. No reduction in this rate as applied to shipments during the Guaranty Period had or has been approved by the Interstate Commerce Commission. The reparation order of the State Commission purports to require the plaintiffs-in-error to refund the difference between this rate and a rate of $1.00 determined by that Commission to be reasonable. Therefore whether or not in the eyes of the State Commission its action might be called a correction of an erroneous situation its order is in effect an order for a reduction of a rate under circumstances clearly within the prohibition of the federal statute.

The language of the opinion of the Pennsylvania Supreme Court suggests that the idea that there may be some distinction under Section 208(a) between a reduction and a correction and that the reparation order of the Commission here sued upon is a correction, may be derived from an erroneous reading of its own opinion in the case of *Lehigh & New England* v. *Public Service Comm., supra,* where the word "correction" is used. The situations in the two cases, however, are clearly distinguishable, and the distinction merely serves to emphasize the soundness of the contentions made by the carriers here.

In the *Lehigh & New England Case, supra,* as here, the rate charged on the shipments during the Guaranty Period was the rate in effect on February 29, 1920,—that is, it was in effect in the sense that it was contained in published tariffs filed with the proper authorities. However, prior to the termination of Federal control a complaint had been filed with the Interstate Commerce Commission under Section 10 of the Federal Control Act (40 Stat. L. 456) alleging that

this rate contained in the published tariffs was unreasonable. The Interstate Commerce Commission instead of finding the rate reasonable, as it did in the case at bar, found it unreasonable to the extent that it exceeded a lower rate which it found would have been reasonable for the period of Federal control. This lower rate the State Commission subsequently found to have been a reasonable rate for the period after March 1, 1920. The effect of the Interstate Commerce Commission's decision in that case was that the rate actually contained in the published tariffs was an unlawful rate to the extent that it exceeded the lower rate found reasonable and therefore was not lawfully in effect on February 29, 1920. The State Commission in awarding reparation to the basis of the lower rate was merely making effective during the Guaranty Period the rate which the Interstate Commerce Commission said would have been reasonable for the period of Federal control. It was in this connection that the Supreme Court of the State in reviewing the case, while clearly recognizing that Section 208(a) would otherwise prohibit a reduction during the Guaranty Period, said at page 502 of its opinion:

> "The State Commission, acting under 208(a), did not reduce a rate, but rather enforced the *corrected* rate."

meaning the rate found by the Interstate Commerce Commission to have been reasonable for the period of Federal control.

How erroneous is the application of this language to the case at bar is apparent when it is realized that in this case the Interstate Commerce Commission was likewise called upon to pass upon the reasonableness of the rate actually published in the carriers' tariffs in effect on February 29,

1920, as applied to shipments moving during Federal control, but found that this rate was just, reasonable and otherwise lawful, regardless of the fact that it was the result of adding the General Order No. 28 increases to a rate which the State Commission had found unreasonable. Thus the rate of $1.10 was not only in effect on February 29, 1920, in the sense that it was contained in the published and filed tariffs but was lawfully in effect since it was found to be reasonable. There was therefore no justification for the action of the State Commission in this case in prescribing a lower rate for the Guaranty Period on the theory that in so doing it was correcting the rate charged to the basis of a rate found reasonable by the Interstate Commerce Commission.

We accordingly urge that whatever contentions our opponents may advance in this connection a judgment for the defendant-in-error enforcing the payment of the reparation ordered by the State Commission in *Docket No. 4738* will in effect amount to a reduction in the rate during the Guaranty Period. Therefore since no reduction in this rate has been approved by the Interstate Commerce Commission and a reduction in rates during the Guaranty Period is prohibited by the Federal statute without such approval, the right of the plaintiffs-in-error under the federal statute to collect charges on the basis of the $1.10 rate must be clear, the reparation order of the State Commission and the Public Service Company Law of the State which would give a cause of action for its enforcement must be invalid because in conflict with the Federal statute, and these facts must constitute a complete defense to this suit under the State law to enforce the reparation order.

D. THE RATES CHARGED ON THE SHIPMENTS INVOLVED IN THE CASE WERE LAWFUL UNDER SECTION 208(a) OF THE TRANSPORTATION ACT, 1920. THEREFORE THEY WERE NOT UNLAWFUL UNDER THE STATE PUBLIC SERVICE COMPANY LAW AND NO SUIT FOR DAMAGES FOR A VIOLATION OF THAT STATUTE CAN BE MAINTAINED.

This is an action for damages under the Public Service Company Law of Pennsylvania. The allegation is that plaintiffs-in-error collected freight charges which were in violation of that statute in that they were unreasonably high. The reparation order of the State Commission is alleged to be *prima facie* evidence of this fact.

If, as we contend, the charges collected were lawful under Section 208(a) of the Transportation Act, 1920, and the federal statute is controlling, the charges could not have been unlawful under the Public Service Company Law of the State; the order of the State Commission can in no way affect their legality and the provisions of a State statute which would make such an order *prima facie* evidence of the unlawfulness of the rate must be invalid in the face of the federal law.

The freight charges collected were based upon the rate in effect on February 29, 1920. That rate was held to be lawfully in effect at that time by the Interstate Commerce Commission. No reduction below that rate was approved or has since been approved by that body.

We therefore submit that under the Transportation Act, 1920, the rates charged were lawful rates. It follows that to hold that the collection of rates lawful under a federal statute constituted a violation of the Public Service Company Law which would create a cause of action for damages under the terms of the State law would amount to denying to the federal statute its controlling effect.

One further contention which has been advanced by the defendant-in-error may be discussed under this point. It is a contention that seemed to carry weight with the Supreme Court of California in the *Southern Pacific Case, supra.* It has been urged that the Interstate Commerce Commission has itself ruled that under Section 208(a) of the Transportation Act, 1920, it has been without power since September 1, 1920, to approve a reparation order with respect to shipments moving during the Guaranty Period. (Conference Ruling of March 13, 1922. See also *Armour & Co.* v. *G. N. Ry. Co.,* 104 I. C. C. 34.) From this it is argued that if the Interstate Commerce Commission is correct in its ruling that it is without power to approve such an order, the result of sustaining the contention of the plaintiffs-in-error here will be to deprive parties of relief from the collection by carriers of unreasonable charges on intrastate shipments during the Guaranty Period.

In the first place, we believe that the Interstate Commerce Commission was probably in error in its view that its power to approve reductions in rates during the Guaranty Period expired at the end of that period. For if the enforcement of an order of reparation relating to shipments during the Guaranty Period in substance causes a reduction in rates for that period then the approval of the Interstate Commerce Commission is certainly required by the statute and there is nothing in the language of Section 208(a) to indicate that although such approval was required it could not be accorded after September 1, 1920.

In the second place, however, we believe that so far as the present case is concerned it is immaterial whether or not the Interstate Commerce Commission was correct in its view. The fact remains that it has not approved a reduc-

tion in the rates here collected. Not only that but it has held that the rate of $1.10 was reasonable. We submit, therefore, that the rates charged were lawful rates under the provisions of the Transportation Act, 1920, and being lawful rates the defendant-in-error has no ground for complaint that it cannot recover reparation, because it has no foundation for a claim for reparation in the doing by the plaintiffs-in-error of an unlawful act.

Suppose that the State Commission's order had been prospective and had been issued in March or April, 1920, and the Interstate Commerce Commission had refused its approval of a reduction in the $1.10 rate for the Guaranty Period or its approval had never been sought, is it not clear that the rate of $1.10 would have remained the only lawful rate under the Transportation Act, 1920.

No right to damages exists unless there has been some unlawful act and if the rates collected were in accordance with the terms of the federal statute they were not in any sense unlawful.

To say that rates were lawful under the Transportation Act, 1920, and yet that the parties were entitled under the State law or otherwise to damages because of the collection of such rates is absurd and denies to the federal statute its controlling effect.

CONCLUSION

We respectfully submit that the judgment of the Court below should be reversed.

Respectfully submitted,

HENRY WOLF BIKLE,
FREDERIC D. McKENNEY,
PARKER McCOLLESTER,
For Plaintiffs-in-Error.

APPENDIX

TRANSPORTATION ACT, 1920

EXISTING RATES TO CONTINUE IN EFFECT.

SEC. 208. (a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

(b) All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

(c) Any land grant railroad organized under the Act of July 28, 1866 (Chapter 300), shall receive the same compensation for transportation of property and troops of the United States as is paid to land grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (Chapter 278).

GUARANTY TO CARRIERS AFTER TERMINATION OF FEDERAL CONTROL.

SEC. 209. (a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore

engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in Section 4 of the Federal Control Act;

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in Section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under Section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operating income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one-half the annual sum fixed by the President under Section 4 of the Federal Control Act;

(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under Paragraph (1), (2), or (4) of Subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway

operating income of any carrier entitled to a guaranty under Paragraph (3) of Subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under Section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under Section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in Section 1 of the Federal Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in Paragraph (a) of Section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and

operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

SEC. 5. If, after hearing, upon complaint or upon its own motion, the commission shall determine that any rates which have been collected, or any acts which have been done or omitted to be done, or any regulations, classifications, or practices which have been enforced for, or in relation to, any service rendered after this act becomes effective, by any public service company complained of, were in violation of any order of the commission, or were unjust and unreasonable or unjustly discriminatory, or unduly or unreasonably preferential; or, in like manner, shall find that the rates so collected are in excess of the rates contained in the tariffs or schedules of any such public service company on file or posted, and in effect and applicable at any time the said service was rendered,—the commission shall, upon petition, have the power and authority to make an order for reparation, awarding and directing the payment to any such complainant, petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of said unjust, unreasonable, or unlawful collections, acts or commissions, regulations, classifications or practices, of such public service company: Provided, That such damages have been actually sustained by such complainant petitioner.

The commission shall state in said order the exact amount to be paid, as well as its findings upon pertinent questions of fact.

If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be prima facia evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received.

No reparation, as herein provided, shall be awarded by the commission unless the complaint or petition shall have been filed with it within two years from the time when the cause of action accrued. A suit for the enforcement of an order directing such payment shall be filed in the said court of common pleas within one year from the date of the order, and not after.

No action shall be brought in any court on account of the wrongs or injuries referred to in this section, unless and until the commission shall have determined that the rate, regulation, classification, practice, act, or omission in question was unjust, unreasonable, or unjustly discriminatory or unduly or unreasonably preferential, or in excess of the rates contained in the said tariffs or schedules, and, then, only to recover such damages as may have been awarded and directed to be paid by the commission in said order.

Sec. 17. Within thirty days after filing of any finding or determination by the commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court; Provided, That there shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided. The said court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all said appeals: Provided, That in case of an appeal from the award of damages or compensation by the commission, under any of the provisions of this act, the appeal shall, in case any party is entitled to demand a jury trial under section eight of article sixteen of the Constitution of this Commonwealth, be to the courts of the proper county thereof, but in all other cases shall be to the said Superior Court. If an appeal be made to any court other

than the Superior Court, the case shall be proceeded with therein in accordance with the practice and procedure made and provided in such cases. In case of any appeal from the award by the commission of damages or compensation for property taken, injured, or destroyed, where the commission shall have power to apportion the amount thereof among, or direct the payment thereof by, any public service companies or municipal corporations concerned, any such public service company or municipal corporation may intervene and be heard in the trial of such appeal, under such rules and regulations as the court in which the said appeal may be pending shall prescribe. All appeals to the Superior Court shall be by petition to said court, setting forth specifically and concisely the error or errors assigned to the finding, determination, or order of the commission; which petition shall be accompanied by a copy of the original complaint, if any, filed with the commission, as well as a copy of the ruling, determination, or order of the commission appealed from; and shall also be accompanied by affidavit of the party or parties appellant, or of its, his, her, or their agent or attorney, that the appeal is not taken for the purpose of delay, but because the appellant or appellants verily believe that injustice has been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition.

SEC. 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act.

SEC. 41. No public service company, nor any officer, agent, or employee thereof, shall be liable for any penalty or forfeiture, or be subject to any prosecution, on account of demanding collecting, or receiving any rate, fare, or charge for any service or product rendered or furnished by it, or for enforcing any rule, regulation, or practice, when such rate, fare, charge, rule, regulation, or practice is contained in the tariffs and schedules properly filed with the commission, and posted or published as herein provided, and is applicable by the terms thereof at the time to the said service or product rendered or furnished, although such rate may be found by the commission to be unjust, unreasonable, unjustly discriminatory or unduly preferential.